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It is regretted that the exigencies of the war have reduced the space available for book reviews and made it necessary to give no more than short notices of some of the works received for review.

INTRODUCTION TO THE LAW OF TORTS*

CECIL A. WRIGHT

THE recognition of 'torts' as a separate and distinct branch of the law is, as things legal go, extremely recent. The first English text-book on the subject (Addison) did not appear until 1860. Since that time, however, the subject of 'Torts' has probably received more attention from both legal writers and the Courts than any other subject in the law. This is understandable if one grasps the extremely wide scope of the field involved, and at the same time bears in mind the impact of modern science on the various activities in which men engage in present-day society.

While no definition of a 'tort' has yet been made that affords any satisfactory assistance in the solution of the problems we shall encounter, the purpose, or function, of the law of torts can be stated fairly simply. Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another. Such a statement of the problem indicates that the law of torts must constantly be in a state of flux, since it must be ever ready to recognize and consider new losses arising in novel ways. The introduction of printing, by facilitating the manner in which a man's reputation might be injured by the dissemination of the printed word, had a tremendous effect on the law of defamation; the radio of to-day presents even more serious problems, as do also the aeroplane and the modern motor car.

The study of the law of torts is therefore a study of the extent to which the law will shift the losses sustained in modern society from the person affected to the shoulders of him who caused the loss. It is obvious that no system of law will ever attempt to compensate persons for *all* losses. Serious bodily injury is something quite different from an affront to the dignity or emotions. One would expect to find that the former was early recognized as the type of loss for which the law was prepared to allow compensation, while the latter is, even to-day, only imperfectly, if at all, recognized by the law as worthy of protection. The development by individuals of a 'tough hide' is still to a large extent deemed more

* The learned author wrote this primarily for Canadian students, but, as it is of general interest, we are glad to have the opportunity of publishing it.—Ed.

desirable than a flood of litigation for outraged feelings, although as we shall see, the law may be in process of change. Injuries to a person's tangible property—land, cattle, etc.—one would expect to find adequately and early singled out by the law for compensation. But what of a person's complaint that by reason of another's action his employees left him, or that he did not continue to have as many customers in his store since the defendant entered upon a certain course of conduct? How shall we classify such cases or develop them by analogy to the older decisions?

On the other hand, we cannot lose sight of the kind of conduct which results in another's harm. It is one thing to hit a man intending to cause harm; it is something else again to make a person compensate another for harm which he did not intend. It is possible, of course, to make a person who caused loss to another compensate that other simply because he caused the harm. It has been suggested, although never proved as a general proposition, that the early law was to this effect; but, even so, the types of loss for which compensation was allowed were extremely limited. To impose such a burden to-day would, it has been argued, place such intolerable limitations on a man's freedom of action as to stifle all enterprise and make the business of living impossible. Actuated by some such view of social policy the law, about three hundred years ago, began to take into consideration, in imposing liability, something akin to 'moral blameworthiness.' Was the defendant in 'fault' in causing the plaintiff's loss? Did he act 'wrongfully'?

This moral connotation has plagued the law of torts. What is meant by 'wrong' or 'fault'? Does it always involve personal blame, and if so, by what standards are we to determine it? In this article such questions cannot be answered, although they should be kept in mind in tracing the various developments in tort. Suffice it to say here that 'negligence' came to be considered as essential to liability in a great number of instances, and negligence to-day forms by far the most important branch of study in the law of torts.

But even while this movement towards liability only for fault or intended conduct took place, there still remained many instances where, in the absence of either, a person had to compensate for harms caused to another. There are instances of liability imposed on one who innocently trespasses on the land of another, believing it to be his own; of a person innocently and entirely without fault publishing defamatory remarks of another, and being held liable therefor. Thus, while negligence *sounds* in fault, in many cases it involves no such thing, and means merely that the law has set a standard of conduct for the protection of others, and that any failure to live up to that standard results in liability. Indeed, there has been an extension of 'strict' liability—or liability without fault—in many directions, one of the commonest instances to-day being the development by the Courts of the doctrine of vicarious liability of a master for the acts of his servant, and another the extension by statute of

liability of an owner of a motor car for the acts of anyone driving such car with his express or implied consent.

Whether a person is held liable for intentional or negligent acts only, or whether a liability is imposed irrespective of fault, is, we believe a question of policy, affected in many cases by the accidents of history. In the main, the Courts by a long process of trial and error—a process still in progress—have evolved certain principles to meet certain situations. Of later years, the legislature has frequently intervened to change or modify these principles. How then should we approach the subject?

Some writers have taken the view that in the process of working out situations in which compensation should be paid for loss caused, the Courts evolved a miscellaneous group of named or 'nominate' torts having little or no relation to each other, and that for a plaintiff to recover he must find a pigeon-hole in which his harm and the conduct of the defendant producing that harm must be fitted. Failing to prove that the defendant was guilty of the named tort, the plaintiff fails.

On the other hand, it has become fashionable in some English textbooks to state that not only is the law of torts broader than a series of categories, but that the unifying principle of the law is that any harm done to another calls for compensation unless the conduct causing the harm can be justified. (See the discussion in *Winfield, Text-book of the Law of Torts*, sect. 7.) If this means that the burden of proving a defence for all harm caused is on the defendant, it is clearly wrong. Frequently the plaintiff must show the nature of the defendant's conduct, as *e.g.*, negligent (in which case the defendant's conduct is not justified) or even malicious, as in malicious prosecution. But even if one were to accept the statement subject to qualifications as to burden of proof—what does it mean? What is justifiable conduct? This, of course, is the whole question of tortious liability. If it means justifiable in law, the statement merely means that you must compensate for harms (and it will be noticed that what *kind* of harms is not specified) unless the law says you are not obliged to. In other words we still have to decide what losses the law deems worthy of compensation, and what are the circumstances producing such harm which will be considered sufficient to entail liability.

As between these two extremes it would seem more realistic for the student to approach the problem of tortious liability from a middle ground. It is true that there are a number of nominate torts. But it is likewise true that a person sustaining a loss does not of necessity have to find a label to describe a 'tort' in order to obtain compensation. Many instances will appear where a plaintiff put forward a new claim, *e.g.*, for mental shock, and was awarded recovery. Other instances of claims partially recognized, or of claims pressing for recognition which have not as yet been openly granted, will also appear.

The law of torts has, in the main, been developed by the Courts proceeding from the simple problems of a primitive society to those of our present complex civilisation. Analogies, logic, judicial experience and

policy slowly reflecting current social, moral, or economic thinking have all played their part in this development, but the essential problem has remained the same—which of the many claims for losses that can be asserted deserve to be recognized, and to what extent will the law curb the freedom of action on the part of the one causing such losses, either by making him refrain from the conduct involving loss or else compelling him to pay compensation.

It would be possible to approach the law of torts solely from the standpoint of the nature of the defendant's conduct, namely, whether it were intentional, negligent, or neither. This, however, would not place due emphasis on the particular claim or interest for which the plaintiff was seeking protection. Both must be considered together. As it is possible to separate different types of conduct causing harm, so it is possible to catalogue the kind of claims or interests which have been put forward by plaintiffs as worthy of legal protection.

The following list is taken from *Harper, Torts* (Indianapolis, 1933):—

- (a) The interests in personality, that is, the physical integrity of the body, and freedom from confinement.
- (b) The interests in property, that is, tangible or physical things and such intangible "property" rights as are ordinarily treated under the head of property.
- (c) The interest in honor and reputation.
- (d) The interests in economic relations and transactions, including, (1) the interest in obtaining accurate knowledge concerning the subject-matter of the transaction, (2) the interest in the integrity of contracts already made, and (3) the interest in entering into advantageous economic relations.
- (e) The interests in the domestic relations, including, (1) marital interests, (2) parental interests, and (3) filial interests.
- (f) Miscellaneous interests such as (1) the interest in freedom from annoying litigation, (2) the interest in privacy, (3) the interest in reputation of goods and title to property, and (4) political interests.'

The first two claims or interests are of paramount importance in the law of torts and involve considering the extent to which such interests have been protected against (a) intentional, (b) negligent, and (c) non-intentional and non-negligent conduct. If a purely rational plan were to be adopted the next consideration would be the extent to which other interests have been likewise afforded protection.

A word of warning must, however, be given. Any purely rational scheme of the law of torts must also find a place for the accidents of history. We must also take note of the fact that the procedural history of our law placed much more emphasis on the question whether the plaintiff's harm was a 'direct' or 'indirect' result of the defendant's conduct—whether the old writ of trespass or trespass on the case would

lie—than on the nature of the defendant's conduct. While these formal procedural requirements have been abolished, they have left their mark and it would be impractical to ignore them. Likewise, some topics can best be considered from a practitioner's standpoint in a place where logically they do not belong. Thus, for example, claims by dependants for the death of the person supporting them, are logically part of the broad class of interests in domestic relations, which includes seduction, enticing away of spouses, etc. For practical reasons, however, such cases may be considered in an entirely different connection simply because from a teaching, as well as a practising, point of view they fit in better.

As a matter of fact it counts for little in what order we proceed. What is important is to realize that we always have present the problem of ascertaining exactly what interest is involved and what type of conduct.

Lest the student receive a wrong impression from what has been written, it should be noted that the elements briefly mentioned here are by no means the sole items of importance in determining tortious liability. Frequently conduct which causes a loss of a type recognized by law and which would ordinarily result in liability may be 'privileged.' 'Privilege' is defined in the *American Law Institute's Restatement of Torts*, sect. 10, as follows:—

- (1) The word "privilege" is used . . . to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto.
- (2) A privilege may be based upon (a) the consent of the other affected by the actor's conduct, or (b) irrespective of the other's consent,
 - (i) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise, or
 - (ii) the fact that the actor is performing a function for the proper performance of which freedom of action is essential.'

Thus, usually an intentional application of force to the person of another results in liability. But if the person so applying the force is doing so in self-defence or for some other object considered as worthy of protection as the plaintiff's claim to physical integrity, no tort has been committed. Privilege can be seen most clearly in the case of intentional wrongs, but it operates under different guises in other fields. For example, a man who is travelling at fifty miles an hour on a busy street and injures a person may be found negligent and liable. But suppose he were transporting a man seriously ill to the hospital, or was the driver of a fire truck?

In addition to 'privilege' there are other situations where the law withdraws its protection of the plaintiff's claim for other reasons, even though the defendant has admittedly carried on an activity which

ordinarily involves liability. Such an instance is the defence of contributory negligence which, at common law, did not operate to prevent the defendant's act from being tortious towards the plaintiff, but precluded the plaintiff from recovering none the less.

In short, while all law has been described as a kind of social engineering, in no department of the law does this become so apparent as in the law of torts. There, in bold relief, we see how the law has in the past struggled, and is to-day struggling, to reach a fair balance between the various claims to compensation on the one hand, and freedom of action on the other. It will not be surprising therefore to find various devices, fictions and theories being employed by Courts to express the results of that balancing process. The task of the student is first to understand the problems, secondly, to evaluate and compare results, in the hope that he can, in the light of past judicial experience, advise wisely on future controversies and argue constructively to assist in their solution.

THE NECESSITY OF ANALYZING COMMONLY USED EXPRESSIONS

Frequently the use of legal 'labels' to describe the results of a case in which compensation has been ordered obscures the true nature of the problem to be investigated for future guidance. Students approaching the study of torts should not be deterred by labels or tags from making a critical examination of the problem presented for solution, or from attempting to discover the true basis of decision. Thus, for example, 'nuisance' is a word that looms large in the law of torts. It is a slippery word which covers the most diverse problems of tortious liability. It is used indiscriminately to refer to the type of harm caused to a plaintiff, as well as to cover up various different kinds of conduct causing such harm. Thus, to conduct a glue factory with all possible care in the centre of a residential district so that odours disturb the comfort and enjoyment of adjoining property owners to an appreciable extent is labelled as a 'nuisance.' If your building falls into the highway and injures a pedestrian, this may be a 'nuisance,' but you may not be liable if you have exercised all due care. The only point in common between the two cases is that the conduct causing the harm originated on the land of the defendant. The injuries are different, and the type of conduct entailing liability is also different.

It is believed that the only sound way in which such confusion can be prevented is to keep separate the two-sided aspect involved in all problems of tortious liability, namely, the type of claim or interest invaded, and for which invasion compensation is sought on the one hand, and on the other the type of conduct which has resulted in such invasion. Thus 'nuisance' might well be reserved to describe a certain type of harm sustained, as for example, interference with the use and enjoyment of land. This, however, does not tell us whether such interference is actionable. To determine that we may have to know, amongst other

things, how that interference was caused, whether negligently or not. Sometimes it makes a difference; sometimes not. To compare, as some English writers and Courts do, 'nuisance' with 'negligence' thus leads to confusion—with which the student will all too soon become acquainted. 'Nuisance' is usually used to indicate a result, and should not be confused, as it often is with the type of conduct producing the result. The confusion becomes twice confounded when we use 'nuisance' to describe a result which is actionable. This merely means that we have already weighed the type of claim against the type of conduct involved, and reached a conclusion—it obscures rather than clarifies rational think.

'Rights' and 'Wrongs'

Another way in which thought is commonly obscured is to place too great an emphasis on the terms 'rights' and 'wrongs' without fully analyzing their implications. Suppose that B makes a promise to A to perform some act, as for example, to buy his wheat crop. A is now definitely interested in having B perform his promise, and may be said to desire or claim that B perform. This desire on the part of A we now commonly style an 'interest.' It has nothing to do with law; it is an existing fact. Frequently we loosely say that A has a 'right' to B's performance. If we do this, however, we have left the bare facts, brought in the law, and reached a certain legal conclusion. The law of contracts may, and in certain circumstances does state that A's claim, desire or interest is worthy of protection and the law will either require B to perform his promise or to pay damages to A. When the law does this it confers on A's 'interest' the protection of a 'right,' and it places B under a correlative obligation or 'duty' to A.

But carry the case a step further. A now has a 'contract right.' Suppose C prevents B by force from performing his promise to A. The mere fact that the law has given legal protection to A's interest in B's promise as against B, does not help us in determining whether A has a 'right' against C. True, he has an interest or claim against everyone in the world that they refrain from interfering with his 'right' against A. The law, however, has still to determine whether that claim or interest is entitled to legal protection, and if it is, against what types of conduct it is to be protected. It was not until 1853 (*Lumley v. Gye*, 2 E. & B. 216) that the law conferred protection on A's claim against interferers such as C, and the law is still in some doubt as to the extent of this protection, as for example, whether it extends to intentional conduct only, or negligent conduct.¹ The fact that A has a contract 'right' against B certainly does not necessarily imply that he has an enforceable interest in that 'right' against C. Suppose, again, that A has no contract 'right' against B, but that he is reasonably certain that B, a former customer,

¹ [The doubt does not exist in English law: Winfield, Text-book of Tort (2nd ed.), 642.—Ed.]

will continue to do business with him. A certainly has an interest or claim that this business be allowed to continue free from interruption. Suppose, however, C induces B, by force or any number of other means, to deal with him, C, rather than A. Has A a cause of action against C in tort? The problem again is whether the law will afford protection to A's interest or claim that persons like C should not interfere, and the law must again strike a balance and consider whether A's claim is worthy of protection and against what types of conduct. There can be little doubt that the fact that A has no 'right' against B has prevented the Courts from dealing with cases like this in as sure-handed a manner as in the contract situation, and yet as we have seen, the fact that A had a 'right' in these cases is really not decisive.

In a case of first impression, *Ashby v. White* (1703), 2 Ld. Raym. 938, the question was whether the plaintiff, granted the privilege of voting by statute, could recover against the defendant for the latter's action in preventing the exercise of that privilege. Note the language of Holt L.C.J.: 'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy.' Does this not assume the whole question? Was not the question before the Court whether the law would give legal protection to the plaintiff's claim to vote against such conduct as that of the defendant?

Compare again the cases where a husband claims damages against a third person for enticing away his wife. In *Winsmore v. Greenbank* (1745), Willes, 577, the Court said that 'the law will never suffer an injury and a damage without a remedy,' and allowed the action. Does this mean that the husband has a 'right' to his wife's consortium which existed before such action was recognized, or that it was merely the Court's recognition of the husband's claim or interest? And what of the wife's 'claim' or 'interest' to the husband's consortium? The Courts in Ontario, at least, have refused to recognize that interest as worthy of protection—have, in other words, refused the legal protection of a 'right.' (See *Lellis v. Lambert* (1897) 24 O.A.R. 653; *Talmage v. Talmage* (1928) 3 D.L.R. 15. See, however, in England, *Gray v. Gee* (1923) 39 T.L.R. 429; *Newton v. Hardy* (1933) 149 L.T. 165.) Too much emphasis cannot be placed on the necessity of knowing exactly what is implied in the use of the term 'right.'

And the English case is "Best"

'Lawful' and 'Unlawful' Acts

Furthermore, to classify a defendant's conduct as 'lawful' or 'unlawful' in the abstract can lead to as great difficulty as the situation just discussed. In a celebrated case in the House of Lords, *Mayor of Bradford v. Pickles* [1895] A.C. 587, Lord Halsbury used the following language, which has, unfortunately, been repeated by other Courts: 'If it was a lawful act, however ill the motive might be, he [the defendant] had a right to do it.'

If it was an unlawful act, however good his motive might be, he would have no right to do it.' This phenomenon of characterizing conduct in the abstract as absolutely 'right' or 'wrong' is unfortunate to say the least. In the law of torts nothing is more important than to bear in mind that conduct is lawful or unlawful in relation to the facts in a given situation.

It will be observed that if we start by saying that what the defendant did was 'lawful' we have solved the problem before we started. Naturally, if the defendant's act was lawful, he is under no liability for the results produced by it, but the essential question is whether the defendant should pay for the results he caused, and further, whether his object or motive in doing the act was not important, or decisive, in answering that question. That it frequently may be, despite the statement of Lord Halsbury, will appear from cases to be studied in the present course.

For example, A shoots partridges on his own property and the noise of the shooting disturbs silver foxes on B's land to such an extent that all possibility of breeding is lost. Can B recover from A for this loss? Is A's act 'lawful'? And if it is, what if A fired the same number of shots with the sole motive of annoying his neighbour and producing the very result attained? Is the shooting still 'lawful,' in the sense that A had a 'right' to shoot and therefore his motive was immaterial? See this problem discussed in *Hollywood Silver Fox Farm v. Emmett* [1936] 2 K. B. 468, and see the controversy between Holdsworth and Goodhart on the point in 52 L. Q. R. 461, and 53 L. Q. R. 1 and 3, where the atmosphere already heavily charged, is made positively oppressive by a confusing use of the magic words 'nuisance in fact' and 'nuisance in law.'

THE NATURE OF CONTRACTUAL OBLIGATION

W. W. BUCKLAND

IN his 'Common Law' Mr. Justice Holmes expressed the view (see pp. 300, 301), that a contract is properly to be regarded as the taking of a risk creating a liability to pay damages in a certain event. 'The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.' In the Pollock-Holmes' Letters the matter is frequently discussed, and there are various passages from which we can get his views in detail (see vol. i, pp. 21, 119, 177; vol. ii, pp. 55, 200, 234). His position seems to be that liability in Contract is completely analogous to that in Tort. If you commit a tort you are liable to pay damages. If you commit a contract you are liable to pay damages, unless something happens, *i.e.*, performance, over which you may or may not have control (i, 177). It is a conditional liability to pay damages. There is, he holds, no reason to speak of 'promise' in the matter at all, in particular, the performance and the payment of damages are not to be thought of as alternative obligations (this in answer to an objection by Pollock).

To this Pollock makes various objections (see vol. i, pp. 79, 80; vol. ii, pp. 201, 233, 234). Such a view, he says, disappoints reasonable expectations. (One does not buy a right to damages, one buys a horse.¹) It is inconsistent with the law of specific performance. It is inconsistent with the doctrine that anticipatory refusal to perform is a breach. It is inconsistent with the rules about frustration and the like. To the 'reasonable expectation' point Holmes answers (i, 55): 'I don't see why the cases on damages do not embody the principle of reasonable expectation: he must know that the person he contracts with believes that he accepts the contract with the special condition attached to it.' That seems to be no answer; he knows, indeed, that it is possible that he may be put off with damages, but that is not what, in the normal case, he either wants or expects. But, perhaps, the objection is not fatal; the law does sometimes disappoint reasonable expectation—it did in *Sinclair v. Brougham*. As to specific performance, Holmes replies that this is not common law, and is exceptional. That, again, seems to be no answer. Pollock observes that it is the normal remedy in other systems, *e.g.*, German law. (He asks where they got it; not from classical Roman Law. Of course not—they do not deal in classical law. They got it from the pandectists who got it from the *Corpus Iuris Civilis*. The point is that, as the context shows, Pollock would like to find a Germanic origin for it.) Holmes' view must mean that the common law conception of

¹ As Paulus puts it, '*tibi enim rem debebam, non actionem*': D. 18.4.21.

Contract is utterly different from that of German Law, which is, of course, not impossible, but certainly has no presumption in its favour. And, when the K. B. Div. decides to give specific performance in a case on contract, we have to assume that it shifts from one fundamental conception of Contract to an entirely different one. That too does not seem very probable. Holmes does not in fact meet the objection. As to the point that, if there is no obligation to perform, anticipatory refusal cannot be a breach, Holmes' answer is that that doctrine is wrong. But that is no answer for, as Pollock points out, it is the law and a very ancient doctrine in the law (ii, 74). The frustration point Holmes does not, I think, deal with. But it is worth noting that if this analysis is correct no unilateral agreement could ever be void for impossibility, initial or supervening, for the only obligation is to pay damages, and our law, like the Roman, takes the optimistic view that it is never impossible to pay money.

It is to be observed that Holmes' neat parallel—commit a tort, commit a contract—is extremely misleading. A man who has committed a tort has done a wrong and rendered himself liable to proceedings. That is indeed what, in this connection, the word 'commit' means. It comes to us from the Latin, probably through the Roman law, and *commisum* is a wrong done. But a man who commits a contract, in Holmes' sense, that is to say, makes one, has not rendered himself liable to legal proceedings, though later events may do so. He has done no wrong, and the word 'commit' is wholly inappropriate. In fact if we use the term at all we must use it of a later state of things. A man 'commits' a contract, not when he makes it, but when he breaks it. The Roman texts bring this out clearly. Where we say a man has committed a breach of his contract we find them saying what can be literally translated as: he has committed his contract, or his contract is committed. Thus, in D. 45.1.63; 46.2.14.1, where the money is immediately recoverable under a promise, the promisor '*committit stipulationem*.' In D. 35.1.67; 41.6.11, in similar circumstances, '*committitur stipulatio*.' In D. 2.11.13; 39.1.13.1, where the money is not yet recoverable under the *stipulatio*, the '*stipulatio non committitur*.' And there are hosts of other texts in the same sense. This meaning is not, of course, confined to *stipulatio*. If any term (*lex*) of an agreement is broken, it is *commissa* (D. 18.3.4.2). If an enactment is disobeyed it is 'committed' (D. 37.4.10.4, '*si per alios committitur edictum*'). And the *dies committendi* is the day of the breach (D. 4.4.38, *pr.*).

Odd results would seem to follow from the doctrine. An artist, whose pictures of a certain size have a market at £50, extracts from the unwary X a commission for such a picture at £100. Next day, reflecting, he decides that a month's holiday at X's expense will suit him better than painting the picture. He accordingly calls on X and says, 'I am under an obligation to you to pay you damages if I do not deliver a certain picture. I propose to satisfy that obligation and not to avail myself of

the way out, namely, delivering the picture. I can produce a dozen experts to prove that the value of the picture, that is, the damage to you from not getting it, is £50. Here are the £50. As I have satisfied my obligation under the contract, and have committed no breach, I require you to do your part. Give me what you promised, that is, £100.' No one supposes he would get away with this, but it is a little difficult to see why he should not, if Holmes' analysis is correct.

I leave to others the question whether the conception can be fitted to our old and modern systems of pleading. It is certain that it could not be applied in Roman actions. In the *legis actio* the plaintiff declares that something is due, *i.e.*, what was promised, and the defendant denies this. If what was due was not what was promised, but damages, it seems that the defendant must always win. So, in the later formulary system, an action on a promise of a certain thing expressly made *condemnatio* depend on the liability for the thing promised, not damages. '*Si paret Nm. Nm. Ao. Ao. tritici Africi centum modios dare oportere*' (Lenel. *Ed. Perp.* (3) 240). If the only obligation were to pay damages, the claim must fail. It must be remembered that this was at a time when judgment was necessarily for money, and specific performance had not even the limited scope it has with us.

For Holmes what the promisor is bound to do is to pay damages, but the liability is avoided if something else happens (what we commonly call 'performance of the contract'). The Romans had a convenient terminology for this state of things. What you are bound to do is *in obligatione*; the thing by which the obligation can be avoided is *in solutione*, a *facultas*. The common cases are noxal surrender of a slave who has committed a delict, which, in historical times, is a *facultas*, a way of avoiding payment of damages, while the action is pending (D. 5.3.20.5; 42.1.6.1), and the case where a man takes a promise to pay to him or a third party; payment to the third party is a *facultas*, *in solutione* (Inst. 3.19.4; D. 45.1.56.2; 46.1.16, *pr.*, 23; 46.3.95.5, 98.5, 98.6). The here material point of the distinction is that if circumstances destroy the obligation, the *facultas* no longer has any significance, but facts annulling the possibility of the *facultas* have no effect whatever on what is *in obligatione* (D. 44.7.44.5). If, under Roman law, A promised by *stipulatio* to give B a horse, this was a binding contract. If the horse was killed by pure accident after the promise, but before delivery, then, according to Holmes' theory, since it is the damages which are *in obligatione* and the horse is only *in solutione*, the destruction of the horse ought to make no difference, ought to produce no effect at all on the obligation. A must still pay B the value of the horse. But of course that was not the law. The accidental destruction of the thing promised released the promisor (D. 45.1.23, 33, etc.).

Thus it does not seem possible to square Holmes' doctrine, either with English law or with Roman law. It is surely permissible to think that a conception which is inconsistent with both the great systems of law

which divide the western world, is of no great value in jurisprudence. It may be true, as Pollock says (*op. cit.* ii, 201), in some other planet. It may even be true in old Chinese law, for we are accustomed to find, in China, reversals of our European notions. It might be a profitable factor in discussions *de lege ferenda* (though I do not think it would), or in discussions of abstract law of the Kantian or Hegelian types. But as an analysis of law as it is, it seems to be of little service.

The theory of Holmes has been adopted by others, and is sometimes found associated with other notions, such as that there are no rights, but claims, and therefore no *iura in rem*, that since what a judge says is law, there is no law and no right under it until a judge has passed upon the point, that, for the same reason, a statute is not law till the Court has interpreted it. Dare one say that all these opinions have a certain affinity with a child's view of the electric light? The child, observing that, within his experience, the existence of a light depended entirely on the question whether the switch was on or off, came to the erroneous conclusion that the switch was all there was to it, ignoring altogether the organization behind the switch, and the fact that the switch is merely a device by means of which the operation of this institution or organization behind the switch is controlled. The judge, too, is merely a device to control the working of the institution which we call the law. Except in cases where there is no law, and he has to legislate, he does not make the law (or at least has no business to make it, for he may be wrong) any more than the switch makes the light, or the organ blower the music. The judge is a concession to the limitations of the human intellect. This is one of the very many cases (one who has not reflected on this matter will be surprised on finding how numerous they are) in which the matter is referred to somebody's 'say-so,' because we have no better means of arriving at the truth. Where a man owns a house he has what we call the right of property, really a complex of rights, liberties, etc. He is, in relation to that house, in a position in which no one else is. If someone interferes with his enjoyment it has to be determined whether the interference is an infringement of his rights. That cannot be left to the parties. If he wants to raise the point he is compelled by the State to refer it to the arbitrament of a judge, who has, in ordinary cases, to turn out the legal result much as a calculating machine turns out the result of complex numerical data. No doubt he is not so near infallibility as the machine, but he is the best we can do. The modern judge is a great improvement on compurgation or the ordeal, whom he superseded. But he is only a device, operating on certain data, the facts of the case and what we call the law, and these data were in existence before the judge, or the machine, got to work on them. Of course where there is no principle governing the case, or there are competing principles, he has actually to make law. But normally, where there is clear law, the judge, in deciding the case, acts, or is expected to act, on certain principles which existed before he was called in. So, too, the statute is there

already, and is one of the data for the judge before he gets to work. It is absurd to say that a statute which has never been disobeyed is not law. The fact that a judge may go wrong, may ignore the settled principles, is a defect in the device: it is not his essential function as these theories seem to consider it.

Holmes' theory appears to be on a different footing from these others with which it is sometimes associated. If it is correct, some hitherto accepted rules of Common and Roman law are mistakes. But, at any rate so far as I have seen, these other theories do not lead to this result; they are attempts to construct an exact and convenient terminology. And the word 'right' is certainly very hard-worked in our books. Exactitude is, perhaps, hardly in question, for we can call a phenomenon what we like. And the new terminology, so far as I understand it, does not seem more convenient. When a man makes a contract he acquires or confers, or both, something. The economic situation is changed in a way of which the law will take account. A party has acquired what we have been in the habit of calling a right, and the Romans called a *res*. Is there any advantage in calling it a state of facts to which the law in certain events will attach a right? Acquisition of a right is a simple notion, but acquisition of a state of facts is, to me, not very intelligible. 'Potential rights' is more intelligible, but not satisfactory, for, if certain events happened, say Acts of Parliament, I might have all sorts of rights which I now have not. They too are potential rights. It might be said that it is a conditional right, which will arise if the promise is broken. That will not fit Roman law, for, if the rights under a contract of sale are conditional, the risks do not pass (D. 18.6.8, *pr.*) and, on a straightforward sale, they do. How the matter would stand in English law I do not know. Using traditional language we should say that an agreement to sell specific goods in a deliverable state transfers the ownership. Whether it is more helpful to say that the transaction creates a state of facts in which the buyer will have certain rights if anyone takes or meddles with or culpably damages the thing, may perhaps be doubted. There is something to be said for the expressions 'primary' and 'secondary' or 'remedial' rights, though they are nowadays very unfashionable. It will be observed that Holmes' doctrine follows necessarily from the proposition that there are no rights, but rights of action, and if that proposition leads to impossible consequences it would seem that it must be false. It is true that a system of law is not necessarily logical in all its details, but surely 'general jurisprudence' ought to be.

NEW LIGHT ON WRITS AND BILLS, AND ON THE INFLUENCE OF ROMAN LAW IN ENGLAND IN THE TWELFTH AND THIRTEENTH CENTURIES

H. A. HOLLOND

I. WRITS AND BILLS

ALL who belong to the small class of persons interested in mediæval legal procedure will wish to express their thanks for, and admiration of, the latest contribution made to our knowledge of the subject by the distinguished literary partnership of Mr. H. G. Richardson and Dr. G. O. Sayles. It appears in Volume 60 of the Selden Society publications (dated 1941, but issued last year) entitled, 'Select Cases of Procedure without Writ under Henry III.' It is, we are told, an instalment prefatory to another volume which will carry the story beyond the year 1272.

The introduction is long and difficult: it is my purpose to give some account of it for the benefit of undergraduate readers, who, without some assistance, will find its conclusions beyond their reach. It is, the learned authors tell us, in the nature of a commentary on Bracton's statement, '*Non potest quis sine brevi agere, cum non teneatur alius sine brevi respondere nisi gratis voluerit.*'

Maitland has made the first six words of this text familiar by quoting them, in his Lectures on Forms of Action, as illustrative of the statement that 'from of old the rule has been that no one can bring an action in the King's courts of common law without the King's writ.' If he had prepared the lectures for publication he would, perhaps, have qualified this statement, and have quoted the whole of Bracton's text. For it is clear from its concluding words that if a defendant appeared without having been commanded and was willing that the dispute between himself and the plaintiff should be dealt with by the King's justices, the Court was not debarred from entertaining the cause by reason of the fact that it had not been instituted by original writ.

How often it happened that a defendant appeared without having been commanded must remain uncertain; the learned authors express no views on this subject; but it seems unlikely that Bracton would have used the words *nisi gratis voluerit* unless willing submission was a fairly familiar occurrence.

It so happens that a case recorded on the earliest surviving plea roll of the Bench, that for the Trinity term 1194, is one in which the defendant appeared without having been summoned. The plaintiff, Avice of Ockley, presented a *querela* to the effect that William Basset had wrongfully levied distress on her cattle. William, happening to be in Court,

offered a defence, though protesting that he had not come for that purpose.¹

The conclusion to which readers of the *Forms of Action* naturally come, though it is not precisely so stated, is that in Bracton's time a plaintiff could not institute proceedings in the King's Court without obtaining from the Chancery a *breve originale*—commonly translated 'an original writ' and meaning a writ originating an action.

The learned authors have demonstrated that this conclusion is untenable. For they have made it clear that many actions, particularly before the justices in eyre, were begun by *querela* (translated 'plaint'), and that, if the defendant had not appeared of his own accord to answer the plaint, the first official step in the action would be a writ summoning him to appear. This would be a *breve giudiciale*, a writ issued by the justices in the course of judicial proceedings, as contrasted with a *breve originale*, a writ issued by the Chancery to initiate proceedings.

'We would emphasize,' write the learned authors, 'that in general the choice between plaint and writ was very much a choice between beginning an action by a judicial writ or by an original writ. A plaint will not necessarily bring the defendant into court; a writ, perhaps several writs, may be necessary for that purpose. This, in effect, reduces the difference between the two modes of beginning an action, where both are available, to the alternative of an application to the chancery or to a court of common law.'²

If the plaintiff knew that no *breve de cursu* (writ of course) was available to him in the Chancery there was an obvious reason for his approaching the justices in the first instance, but there were cases in which a plaintiff chose to proceed by *querela* submitted to the justices, instead of by *breve originale* purchased from the Chancery, although the latter procedure would to all appearances have been more expeditious.

The learned authors suggest that the reason for the plaintiff's choice in such cases may have been the avoidance of the 'trouble of purchasing a writ from a perambulating chancery.'³ For in and before the reign of Henry III the Chancery accompanied the King in his progresses through the country, and, while the justiciarship existed, accompanied the justiciar during the King's absences abroad.

We are faced with the problem that the picture above presented of procedure by *querela* subsisting side by side with procedure by *breve originale* does not emerge at all clearly on a mere reading of Bracton's treatise. He does, indeed, use the expression *querela sine brevi* in connexion with the baronial Courts and the County Court. But he says very little of it, and almost nothing of those plaints without writ, which came before the King or the King's justices. 'The reason for his silence,' say the learned authors, 'is not obvious. In a sense the

¹ This case is cited on p. liv, from p. 26 of *Three Rolls of the King's Court*, Pipe Roll Soc. Vol. 14.

² P. cxlvi.

³ P. cxli.

procedure is exceptional, but during his lifetime there must have been, term after term, at least a few actions heard by the judges at Westminster or by those who accompanied the king, which were begun otherwise than by an original writ. Out of nearly 1,800 cases in the central courts, excerpted for the Note Book there are perhaps thirty or so which appear with certainty to be actions begun by plaint, but there is little doubt that we must multiply this figure to include actions begun in this fashion which were entered on the plea roll in a way that obscures their origin. Such actions were perhaps more frequent before justices in eyre than before the central courts, although Bracton noted but one such case for his Note Book. They became, however, markedly more numerous in eyres held after he had ceased to write. The importance of this form of action lay in the future.⁴

It is not so surprising that there is nothing in 'Glanville' on the subject of actions other than those begun by writ, for 'Glanville' is a much smaller book than Bracton's great treatise, and the author, being concerned with the writ system, 'the most noteworthy creation of the age of Henry II in the domain of law,'⁵ may well have assumed a knowledge of the older procedure.⁶

Also it is clear that in Glanville's time a complainant might come either to the King or to his justices to obtain a writ. 'The King may have his chancellor by his side and the justices may be far removed from the King, but all surely are equally present in the *curia regis* and in the *curia regis* the King's writ may be obtained.'⁷ In short, the word *curia*, when used in Glanville, means in some contexts the place where the writ is obtained, in others the place where the plea is decided. Hubert Walter, Richard's justiciar, not only presided over the Bench, when present, but also issued writs, and so did his predecessors. The distinction between original and judicial writs probably resulted from the gradual demarcation of the respective functions of the judiciary and the chancery, a demarcation which must have been aided by the weakening, and then the disappearance, of the office of justiciar under Henry III. 'There is no suggestion of any antagonism between judiciary and chancery. There is not only the evidence of Bracton, who may not be unprejudiced, but the evidence also of the early registers of writs, the work of the chancery clerks themselves, to show that William of Raleigh played a great part during his judicial career in devising new writs: and we know from the chancery rolls themselves that from time to time Bracton also drafted a writ. Occasionally these writs might be the result of legislation, but

⁴ Pp. xiii, xiv.

⁵ P. lv.

⁶ It will be observed that the learned authors here refer to the *querela* as 'the older procedure,' while in the earlier passage they state that its importance lay in future. There is not necessarily an inconsistency. In legal history the periods of time involved are long, though they are apt not to seem so when we read of them. There is scope in the course of a hundred years for a particular form of procedure to have its ups and its downs, its waxing and its waning.

⁷ Pp. cxlvii, cxlviii.

others seem to be the fruit of some less elaborate process. . . . The sum total of the writs, whose origin is certain and datable is small: in general the process of writ-making is obscure.’⁸

By way of illustration the learned authors give details of a writ which existed in two alternative forms, the one, an original writ, obtainable from the Chancery, the other, a judicial writ, obtainable from the justices. This was the writ *de ventre inspiciendo*, which was available to the heir of a man who had died childless, when the widow claimed that she was pregnant by her deceased husband. They see no reason to suppose that this parallelism was exceptional, and they suggest that the evolution of the writ system can be explained only by supposing that during its formative period the justices, when *querelae* were submitted to them, devised writs to meet the circumstances, or issued writs which they had already devised. One may fairly suppose that when a sufficient number of precedents had accumulated, showing that the justices had taken cognizance of grievances of certain kinds, the Chancery clerks granted writs to all applicants, whose grievances were on similar lines, and that such writs were recognized as ‘writs of course’ (*de cursu*). When this had happened the Courts would tend to direct a complainant, whose grievance seemed to fall within the scope of a particular writ to purchase such a writ from the Chancery. ‘The broad outline of this historical process,’ say the learned editors, ‘does not seem open to question, though the details of its working may escape us. These details may one day become less obscure when the history of the early registers of writs is written, and the accomplishment of that task is long overdue.’⁹

The principal guide taken by the learned authors for determining whether cases were begun by *querela* is that of the *initial* words of the entry on the plea roll. Where an entry begins ‘A.B. *queritur*,’¹⁰ or ‘*Convictum est per juratam in quam* C.D. (the defendant) *se posuit quod* . . .’ they have assumed that, as a rule, the plaintiff proceeded by *querela* (plaint), and not by an original writ. ‘There may sometimes be positive evidence in the body of the entry which confirms this assumption, and there may be the negative evidence that the form of entry is unlike any which we should expect, had the action been begun by any original writ known to have been in use under Henry III. But we have no written complaints which we can match with any of our cases and so demonstrate directly that the actions were founded upon complaints, for no written complaints survive for any period before the reign of Edward I.’¹¹

The formula ‘*queritur quod*’ can be traced back to the earliest plea rolls, and, indeed, beyond them, for it appears in the records of the

⁸ Pp. clii, clii.

⁹ P. clv.

¹⁰ The significance of *queritur quod* lies not in the words themselves, but in their position as initial words in the record. The classical entry in the record of a case of trespass *by writ* contains the words *unde queritur* at a later stage. Professor Plucknett, in a letter to me, has made the point admirably by the statement that the cases collected in this volume are cases where the record does not refer to an original writ, but begins with the declaration.

¹¹ P. xlv.

complaints made to the commissioners who undertook one of Henry II's great judicial inquiries, the Inquest of Sheriffs of 1170.

The cases transcribed in the volume begin with nine described as heard at Westminster between 1224 and 1226 inclusive; then follow twenty-four belonging to the years between 1234 and 1269 inclusive, of which some are described as *placita coram domino rege*, others as *placita coronae coram consilio domini regis*, others as *placita coram* certain named justices. The next group consists of 105 *querelae coram justiciariis itinerantibus*, and, finally, there are two *querelae coram justiciariis de banco*, pleas heard before the Common Bench at Westminster.

In connexion with this classification the learned editors remind us that during Henry III's minority the royal justices sitting at Westminster sat as a single tribunal, which was still sometimes called as it had been in the days of the absent King Richard, *magna curia*. The King attained his majority by stages, and, 'though he may occasionally have heard cases in person before the Trinity Term 1234, it seems probable that it was not until then that a court *coram rege* was definitely constituted, with its own judges and its own records.'¹² From that date the *Coram Rege* Rolls and the *De Banco* Rolls constitute two distinct series. While hesitating to speak too positively the learned authors express the belief 'that from the time when the two courts had separated, and presumably as a result of that separation, an original writ was almost invariably necessary before a plaintiff would be heard in the Common Bench,' but they promise more on this subject on another occasion.¹³

That the King's justices, when sitting *coram rege* or *in eyre*, entertained *querelae* is a proposition which cannot be regarded as doubtful; that they did not insist on such *querelae* being put into writing is in the nature of things probable. The question whether most plaints were submitted to the King's Courts in writing in the reign of Henry III is treated by the learned authors in Section VI. It cannot be answered precisely. Their impression—and this is worth much—is that the majority were in writing. That must suffice, and, indeed, the matter is of subordinate interest.

But I hesitate to accept their conclusion that when Bracton uses the word *libellus* he means a written *querela*. The passage which they examine¹⁴ is from f. 112: '*et si qui putet se petitionem habere, actionibus debet experiri, quia nemo sine actione experitur, et hoc non sine brevi sive libello conventionali, quia nemo de libero tenemento suo sine brevi vel eius pertinentiis, nisi gratis voluerit, respondebit.*'

They interpret the words *sine brevi sive libello* as meaning that one may begin an action 'either with a writ or with a libel,' and, if I understand them aright, they consider Bracton to mean by '*libellus*' a written *querela*.

It would require too long a digression to discuss the passage fully:¹⁵

¹² P. xlv.

¹³ P. xvi.

¹⁴ P. lx.

¹⁵ A full discussion would involve an examination of the question what emendation, if any, of the second part of the text would be possible.

I must merely submit with great respect and diffidence my opinion that Bracton, who was thinking of actions concerning land, says here that no one can bring an action concerning a freehold without a writ,¹⁶ or in other words (*sive*) a *libellus conventionalis*. Bracton's fondness for arraying English institutions in Roman dress is notorious, and here he seems to be telling his readers, not as a matter of importance, but as one of incidental interest, that the *breve* of the King's Courts is the nearest equivalent of the Roman *libellus*. There is some support for my view in the fact that Maitland commenting on Bracton's statement '*in uno libello possunt duae contineri actiones*' says that by *libellus* he means a writ.¹⁷ And I cannot believe that Bracton would have made the statement of the half-truth, which the view of the learned authors imputes to him, that an action could be begun either by writ or by *written* plaint—for *libellus* of necessity connotes writing—thus ignoring the fact that an action could be begun by an oral *querela* as well as by a written one.

The identification of the written *querela* with the *libellus* leads naturally to remarks about the word 'bill,' which came into use before the end of the century, and was employed to denote, *inter alia*, a written *querela* submitted to the justices in Eyre in the reigns of the three Edwards. Bolland, who discovered in the Record Office some hundreds of these forgotten Bills in Eyre, derived the word 'bill' from *libellus*,¹⁸ and this derivation was regarded by Holdsworth as probably right.¹⁹ The learned editors approve it;²⁰ they vouch William Somner, the 17th century scholar. It is much more attractive than the derivation, given in the dictionaries, from the word *bull*, the parent of the Papal bull. But modern etymological science is highly specialized and technical, and I am not aware of the problem having been examined with due regard to it. I am advised by a very distinguished philologist that, as a matter of first impression, the inference of the transition from *libellus* to bill is one for which there is no linguistic justification. I feel justified therefore in submitting that for the present the matter must be regarded as *sub judice*.

II. TRESPASS AND NOVEL DISSEISIN

The fact that many of the cases transcribed in the volume relate to *transgressiones* justifies the inclusion in the introduction of a section of twenty-seven pages entitled, 'The Action of Trespass.'

Attention is first called to the 'seeming anomaly' that although actions of trespass are by no means infrequent in the early plea rolls, Glanville makes no mention of any such action. 'But then such actions, so far as we know, were not brought by writ until the reign of Henry III,

¹⁶ The earliest statement of this rule is in Glanville (Lib. XII, cc. 2, 25). See Case No. 5 in this volume.

¹⁷ Bracton, f. 103; *Bracton and Azo*, S.S. Vol. 8, pp. 175—176.

¹⁸ Bolland announced his discovery in 1912, S.S. Vol. 27, and his views as to the derivation of the word 'bill' in S.S. Vol. 30.

¹⁹ *H.E.L.* II, 339.

²⁰ P. lxii.

and Glanville, as we have already noticed, does not treat of actions begun by plaint. Why the author should have passed such actions over with a mere glancing reference, we are unable satisfactorily to explain. Upon his silence, however, no argument can be based, for, if he ignores the action of trespass, he ignores equally the many other actions without writ which form a small, but a not inconsiderable, part of the contents of the plea rolls of Richard and John.²¹

May I be allowed to interpose at this point a warning lest the use of the expression 'action of trespass' be misunderstood? '*Transgressio*,' of which '*trespass*' is the Anglo-French equivalent, was not a technical term at the end of the 12th century, any more than '*debitum*' has a technical meaning in Glanville. So many words used in legal proceedings ('seisin' is an excellent example) only gradually became technical. And, indeed, as late as the 17th century, as the Authorized Version of the Lord's Prayer shows, 'trespass' was still current in lay usage. Trespass and *transgressio* have, like all words expressing philosophical or legal ideas, their origin in metaphor—they are based on the notion of going across a boundary, as Bracton pointed out when he wrote '*transgressio autem cum modus et mensura non servatur*.'²²

The statement that actions of trespass are not infrequent in the early plea rolls means therefore that we find there records of actions in the King's Court (in addition to and distinct from appeals), redressing wrongs similar in character to those in respect of which at a later date a writ of trespass lay.

In recent years attention has been called to the problem of the origin of the action of trespass by Professor Woodbine's brilliant articles in the Yale Law Journal.²³ He argues with great persuasiveness that the action grew out of the assize of novel disseisin. But his argument does not convince Professor Plucknett, nor has it convinced the learned authors, whose conclusion seems to be substantially that of Professor Plucknett, though it is not clear whether they have realized the extent of their agreement with him. In Professor Plucknett's view the two main types of action in the King's Court—the petitory action, claiming restitution (*praecipe quod reddat*), and the querelary, claiming compensation, may both be traced back to the age before the common law. 'In that age England still lived under a customary law which can be conveniently described as "Germanic," and which was matched in many other European countries with similar customs; "in all probability neither the victors nor the vanquished on the field of Hastings knew any one legal formula or legal formality that was not well known throughout many lands."²⁴ Now this old Germanic custom had two main types of procedure. One was a demand for a thing or the enforcement of a due; the other was a complaint against a wrong. The former looked forward to specific relief;

²¹ P. cviii.

²³ 33 Y. L. J., 799—816; 34 *ibid.* 343—370.

²⁴ These words in double inverted commas are quoted from P. & M. II, 558.

²² F. 101.

the latter to compensation, *bot* or some similar form of settlement. Here, then, we already have the prototypes of the two great groups of actions, the demand becoming the writ of right, and the complaint the action of trespass.’²⁵

This opinion tallies with the belief expressed by the learned authors that ‘the ultimate origin of the action of trespass lies remote in the history of English law, before the terminology of the civil law passed into the common speech of English lawyers.’²⁶ They remind us that immediately after the Conquest justiciable disputes between Frenchmen were settled by proceedings leading to battle (afterwards called appeals), and between Englishmen by proceedings leading to compurgation or ordeal. During the course of the 12th century the merging of the propertied classes of the two races led to an intertwining of the two types of proceedings. Maitland himself drew attention to the closeness of the connexion when he wrote that ‘the action of trespass is, we may say, an attenuated appeal.’²⁷ How close the connexion was is illustrated by case 1 in the volume, from the Curia Regis Roll for Michaelmas, 1224, which records both a *querela* and certain *appeals* arising simultaneously out of a family quarrel in Yorkshire. And the learned authors after calling our attention to the fact that several of the cases included by them show that for a long while an ‘action of trespass’ might still be decided by compurgation in the 13th century, conclude the section with the words, ‘We may well think that past generations of Englishmen who knew not French Kings would have recognized in these actions, though perhaps under an odd outlandish garb, a long familiar thing.’²⁸

But while they stress the native ancestry of trespass they discern some traits which were contributed to its features as a result of a *liaison*, if one may be allowed the metaphor, with Roman law. The roll of the Essex eyre of 1198 contains a record of an appeal by Serle the son of Eustace against Roger the Smith, who had beaten him *ita quod noluit habuisse pejoramentum pro centum solidis*.²⁹ This statement (that the plaintiff would not have regarded the beating as worth having for the sake of a hundred shillings), in other words the naming of a sum by way of ‘damages’ is obviously reminiscent of the *libelli* (statements of claim) of the ecclesiastical Courts quoted by William of Drogheda in his *Summa Aurea*,³⁰ and of the Institutes of Justinian which bade the *judex* condemn the defendant ‘*vel tanti quanti injuriam passus aestimaverit vel minoris prout ei visum fuerit*.’³¹

In the course of the 13th century this internal evidence of the influence of the Roman *actio injuriarum* wore away, for the practice came to be

²⁵ Plucknett, Concise History of the Common Law, p. 332.

²⁶ P. cxxxii.

²⁸ P. cxxxiv.

³⁰ P. cx. William of Drogheda, the foremost ecclesiastical lawyer of his day, was murdered in his house in Oxford in 1245. P. lvii.

³¹ Inst. IV, 4, 7, cited p. cxi.

²⁷ P. & M. II, 526.

²⁹ Quoted on p. cix.

for the plaintiff to charge 'grave dampnum' generally, and if any values were stated they were estimates of specific items of loss.

The expression *vi et armis* so long associated with the writ of trespass is also brought under examination. In Book IV of Justinian's *Institutes*—title 15, *De interdictis*—it is stated that one who dispossesses another by violence is held under the *lex Julia de vi*, whether the *vis* is *privata* or *publica*, and that *vis publica* means *vis 'cum armis,' arma* including not merely swords and the like, but also sticks and stones.

'The circumstances that give rise to some appeals of felony and some complaints of trespass were very like those that had given rise to the Roman actions, and the likeness can hardly have escaped the notice of any attentive Englishman who had read the relevant passages in the *Institutes*, *Code* or *Digest*. There seems indeed no great difficulty in accepting the possibility of a distinct debt in this instance rather than a vague borrowing from the general terminology of Roman law. The phrase *vi et armis* may very well be derived from the definition of *vis publica* in the *Institutes*. *Vis publica* is a conception not unlike the conception of a breach of the king's peace as it had evolved in the later twelfth century; and, as we have already remarked, the allegation of force and arms is, like an allegation of felony, indicative of a breach of the peace and is introduced for the purpose of removing an action from the jurisdiction of the sheriff to the king's court. Whatever borrowing of terminology there may have been, the English action was otherwise unaffected by either of the Roman interdicts. The formal defence in the action of trespass, the denial of *vis* and *iniuria*, is there to remind us that, if any Roman action had an influence, it was the *actio iniuriarum*.'³²

In the light of the views just summarized and of the stress laid elsewhere in the introduction on the influence of Roman law,³³ it is most surprising to find the learned authors seeing difficulty in discovering a parent for the assize of novel disseisin in the canon law or in the civil law.³⁴ Maitland, writing of this assize on various occasions, referred, as if stating an admitted historical fact, to the inspiration of the canonists' *actio spolii*, which in its turn had been suggested by the Roman law interdict *unde vi*. Maitland was, we are now told, guilty of an anachronism, for the canon law had not evolved the *actio spolii* before the end of the 12th century. But, as the learned authors themselves tell us, 'the principle that anyone ousted from possession should be restored before the title to the subject matter could be determined by legal process has good claim to be considered an ancient maxim of canon law. It was stated explicitly and emphatically in the False Decretals,

³² P. cxxxii.

³³ On p. lix an illustration is given of the fact that at the end of the 12th century the King's judges at the Exchequer might, in another capacity, hear an ecclesiastical cause, apparently without even leaving the Bench. 'It is to our mind inconceivable,' write the learned authors, 'that with this identity of personnel the practice of the common law of England remained unaffected by the procedure of canon law, and therefore of civil law.'

³⁴ P. cxxix.

the contents of which became known in England in the eleventh and early twelfth centuries, before the relevant texts were collected and methodised by Gratian and thus obtained a wider currency.'³⁵ The famous False Decretals appeared about the middle of the 9th century; Gratian published his *Decretum*, the substructure of the *Corpus Juris Canonici*, about 1140; in it he applied the above-stated principle to the case of bishops ejected from their sees. This application formed the starting point of the evolution of the *exceptio spoli* and the *actio spoli*, and their extension by analogy to personal property and to incorporeal rights of all kinds capable of being quasi-possessed.

After making the admission quoted above, the learned authors submit the consideration which in their opinion precludes us from finding a parent for the assize of novel disseisin either in canon law or in civil law. It is this, that 'the assize introduces a new principle. The English or, we should more correctly say, Anglo-Norman, action has this much in common with the others that its object is to reseiise those who have been dispossessed without judgement of the court; but it is more than a preliminary to an action to decide the proprietary right, which is the stage at which similar actions in other systems of law seem to have stood in 1166, however they may have developed in the future. The assize of novel disseisin decided the immediate question finally and in such a way that few of the many thousands of actions were followed by litigation to decide ownership. The work of the jurors and judges was well enough done to discourage the disappointed litigant from venturing further, and the English possessory action decided, for most practical purposes, the question of title.'³⁶

But surely this is a misuse of that hard-worked word 'principle.' The proposition that 'a peaceable *de facto* enjoyment should not be interfered with except by legal process,' may fairly be called a principle: the reason for protecting possession, irrespective of title, may have been, as Savigny thought, the preservation of the public peace, or, as Ihering thought, the assumption that a peaceful possessor is more often than not the person entitled;³⁷ but the reason is not a principle. We do not know which of these reasons inspired either the praetor who, some generations before the days of Cicero, created the interdict *unde vi*, or Henry II's able administrators, who, Bracton tells us, spent wakeful nights threshing out the details of the assize.³⁸ A brilliant success awaited both innovations; whether the success of the later one exceeded the bounds of its authors' restless dreams, or was foreseen by them, is surely irrelevant to the question whether they did, or did not, introduce a new principle.

³⁵ P. xxviii.

³⁶ P. cxxix.

³⁷ Buckland, *Text-Book*, p. 724.

³⁸ Bracton, f. 164b: '*de beneficio principis succurritur ei per recognitionem assisae novae disseisinae multis vigiliis excogitatum et inventam*'; quoted P. & M. II, 632, n. 2.

III. RALPH NIGER ON ROMAN LAW

A most interesting and valuable addition to the evidence on the subject of the influence of Roman law in England in the reign of Henry II has recently been made by Miss Beryl Smalley.³⁹ She has transcribed and edited Chapter XIX, *De iudicium insolentia*, of an unpublished work, *Moralia Regum*, by the English 12th century chronicler Ralph Niger.⁴⁰

The *Moralia*, written between 1179 and 1189, is a commentary on parts of the Old Testament.⁴¹ It is an exposition of the scriptural text after the manner fashionable in the 12th century, the Biblical characters being treated as personifications of abstract ideas, and incidents being interpreted allegorically. This form of commentary was developed by theologians in Paris as a means of satirizing and denouncing contemporary abuses; Stephen Langton, for instance, when lecturing there, made use of it. He, like Niger, refers to the legal studies of clerics, criticizing them for deserting theology in favour of the more lucrative pursuits of medicine and law. Miss Smalley quotes Langton's gloss on the passage in Genesis where the raven is loosed from the ark. He refers to a curious popular tradition about ravens, that they refused to feed their nestlings until they saw black feathers beginning to sprout, and says that, similarly, in England abbots and bishops refuse to give prebends to their relatives unless they study law.

In Niger's commentary on the second book of Samuel David signifies justice, in its widest sense, his sons the various types of legal procedure. Amnon, who was put to death by Absalom for his raping of Tamar (II Samuel, 13) signifies barbarous old customs, Absalom, the favourite son, signifies Roman law.

Niger's own point of view in the burning controversy over the respective merits of Roman law and local customary law seems to be a balanced one. He admits the great merits of Roman law when administered by a good and wise man, but says that its potentiality for good is equalled by its potentiality for evil if it is administered by an ignorant

³⁹ M.A. (Oxon), Ph.D. (Mane.), History Tutor of St. Hilda's College, Oxford; sometime Research Fellow of Girton College, Cambridge.

⁴⁰ Niger studied at the University of Paris, and was a Master of Arts by 1168 at the latest. His master in theology was Gerard la Pucelle, who was also a canonist and described as *in utroque jure peritus*. He is known to have been a member of the court of Henry II's son Henry, with whom he may have taken refuge as a supporter of Becket. A paper on Niger's life and literary activity was published in 1940 by Fr. G. Flahiff, in the *Mediaeval Studies* of the University of Toronto: II, 104—126.

The transcript of the chapter is published in the *Mediaeval and Renaissance Studies* of the Warburg Institute, London, Vol. I, No. 2, pp. 249—252. The article on the chapter, entitled *An English Theologian's View of Roman Law*, is described as 'by the late Dr. Hermann Kantorowicz and Miss Beryl Smalley.' It is in two parts. Part I is by Dr. Kantorowicz: it gives an account of the evidence relating to Pepo, whose part in the history of the law school of Bologna is disputed. Niger refers to the civil law as dawning (*velut aurora surgente*) with Master Pepo, and being diffused by Master Irnerius (*propagante magistro Warnerio*). For Pepo, Miss Smalley gives me a reference, not cited by Kantorowicz, to Rashdall's *Medieval Universities*, ed. Powicke & Emden I, 111—113.

Part II, a short account of Niger's *Moralia*, and of Chapter XIX in particular, is by Miss Smalley. The editing of the text is by the two scholars jointly.

⁴¹ The only known manuscript extant is in the Lincoln Cathedral Library.

or malicious one. That there had in his opinion been some abuses is shown by his commentary on the text *Et mane consurgens Absalon stabat juxta introitum portae* (II Samuel, 15, 2). This means, he says, that after the civil law had once secured a foothold, there arose a class of legal experts, or rather legal smatterers (*vel potius legis picatorum*), which stood at the entrance of the gate to interfere with the normal way of life. *Stabat laborans gratia questus temporalium, vel ignorans subtilitatem legum, et ideo nocens. Stabat juxta introitum portae, et non in porta veritatis et via justitiae. In causis enim emergentibus non intuentur veritatem amore divino, sed suam tantum venerantur utilitatem in omni judicio.* This means in substance that the practitioners of Roman law have been harmful, either because they have had primary regard to their own gain, and not to the pursuit of truth and justice, or because they have been ignorant.

And again on the text *Faciebatque hoc omni Israel qui veniebat ad judicium ut audiretur a rege, et sollicitabat corda filiorum Israel* ('And on this manner did Absalom to all Israel that came to the King for judgment: so Absalom stole the hearts of the men of Israel.' II Samuel, 15, 6) he writes as follows: *Hujus ordinis progressum vidimus in Italia et maxime in Anglia, ubi quidam scioli picati legibus, in libro qui dicitur 'pauperum,' de jure minus instructi, aequitatem juris Romani magnificabant, et quibusdam veris et verisimilibus rationibus artem juris et aequi commendabant et in populo favorem ex eo quaerebant et utilitatem propriam et non commoda proximorum. Sollicitabant itaque corda filiorum Israel dum affectarent eorum judicia et profana reputarent communis status arbitria.*

The last sentence recalls an earlier one, '*Verumtamen aliquando incusabant judices et statum communem, qui non omnimodis secundum leges judicarent, sed potius secundum regionum suarum consuetudines.*' 'Leges' means the legal texts of Roman law.

The substance of Niger's complaint is that Italy, and even more so England, have been suffering from dabblers in Roman law. '*Scioli*' means 'smatterers' and '*picati*' 'daubed,' literally with pitch. These men have been ingratiating themselves with the public, and, while professing to be inspired by the reasonableness of Roman law, have in fact been primarily concerned not with the common good, but with self-advancement. Having acquired a superficial acquaintance with Roman legal texts from the *Liber Pauperum* of Vacarius rather than a thorough training in legal principles, they seek to make those texts the one touchstone of all litigation and sneer at the judgments of the *judices* and of the *communis status*, by which expressions he denotes the *liberi et legales homines*, the doomsmen of the local Courts.

In another sentence he refers to the part played in furthering the advancement of Roman law by the Church, which overcame the initial reluctance of rulers to depart from the old customs of their countries. *Sed et quamquam ab initio displicerent jura principibus* (*jura* must here mean Roman law), *quia vetustas consuetudines erassissent, tandem tamen ecclesia procurante et propagante eorum scientiam, usque ad principes*

produxerunt eorum notitiam, et apud eos invenit gratiam. To us who are familiar with the academic use of the word 'don' it is of interest that in the next sentence he mentions that persons who professed Roman law, as they grew in number and influence, scorned the titles '*doctor*' and '*magister*,' and insisted on being called '*domini*.'⁴²

Thus it is clear that in the second half of the 12th century there was smouldering among educated folk of the humbler sort a resentment against the encroachments of Roman law, such as that which burst forth into flame at the Council of Merton in 1236, when the barons of England, led by William of Raleigh, great in the church, but still greater in the law, uttered the famous *Nolumus leges Angliae mutare quae usitatae sunt et approbatae*.⁴³

⁴² Miss Smalley informs me that Miss Eleanor Rathbone has collected a mass of evidence on the subject of masters of the civil law and legal studies in England in the 12th century in her unpublished thesis on 'Cathedral chapters as centres of learning in the 12th century.' This thesis is deposited in the library of London University. It is very much to be hoped that she will publish it after the war.

⁴³ P. & M. I, 188—189.

BOURHILL v. YOUNG¹

A. L. GOODHART

IN an article in the *Canadian Bar Review*² on the recent case of *Bourhill v. Young* Dr. Cecil Wright says that this is 'one of the most important decisions in the law of tort which has appeared since *Donoghue v. Stevenson*.'³ But, as he points out thereafter,⁴ it is difficult to determine from the speeches of the law lords exactly what principles it has established concerning the 'ambit of risk' or the extent of liability for nervous shock. That this doubt is fully justified is shown by the fact that Professor Winfield in his *Text-book of the Law of Tort*⁵ deals with the case in the section entitled 'Remoteness of consequence (or damage)' while Dr. Stallybrass⁶ suggests that it is primarily authority on the problem of negligence. Perhaps this difference of opinion reflects a certain degree of uncertainty in the judgments themselves, for their Lordships, although reaching the same conclusion, do not seem to have been in complete agreement concerning the grounds on which they did so.

The facts can be stated briefly. The appellant (plaintiff or pursuer), a fishwife who was pregnant, was unloading her basket from a tramway car when a motor cyclist, driving at an excessive speed, passed back of her, and then collided with a motor car forty-five feet away. The noise of the collision gave her such a shock that a month later her child was stillborn. It was agreed that the appellant had seen and heard nothing of the cyclist until the sound of the impact of the two vehicles reached her senses, and that her terror did not involve any element of reasonable fear of immediate bodily injury to herself. On these facts had the cyclist been guilty of a breach of duty to the appellant? The House of Lords, unanimously affirming the decision of the Second Division of the Inner House of the Court of Session (Lord Justice-Clerk Aitchison dissenting), held that there had been no breach of duty but, as we have said above, they reached this conclusion on separate grounds.

THE AMBIT OF ORDINARY PHYSICAL IMPACT

The judgments of Lord Thankerton, Lord Russell of Killowen, and of Lord Macmillan were based on the ground that the appellant, standing forty-five feet away and on the near side of the tramway car, was outside the ambit of ordinary physical impact, and therefore the cyclist owed

¹ *Hay or Bourhill v. Young* [1943] A. C. (Sc.) 92.

² (1943) 21 *Canadian B. R.* 65—78.

³ At p. 65.

⁴ At p. 70: 'It is a matter of much greater difficulty to determine from the speeches of the law lords the extent of liability for nervous shock, or, putting it another way (in line with the general views expressed in that case), what the nature of a defendant's duty may be or what defines the "ambit of risk" or "area of potential danger."'

⁵ 2nd ed. at pp. 89—90.

⁶ (1943) 59 *L. Q. R.* 277.

no duty of care to her as he could not reasonably have foreseen the likelihood that she would be affected by his negligent act of colliding with the motor car. Thus Lord Thankerton said:⁷

‘The risk of the bicycle ricochetting and hitting the appellant, or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held bound to have contemplated it . . .’

and he also said:⁸

‘At the time of the collision with the motor he was well past the tramcar and the appellant was not within the range of his vision, let alone that the tramcar obstructed any view of her.’

Lord Russell of Killowen adopted the same test of duty of care, based on the foreseeability of physical impact. Thus he said:⁹

‘The duty of a driver of a motor vehicle in a highway has often been stated in general terms which, if literally interpreted, would include persons to whom the driver would obviously owe no duty at all, as, for instance, persons using the highway but who, having passed the vehicle, are well on their way in the opposite direction.’

As in the present case the cyclist had passed the appellant before the collision occurred he owed her no duty of care.

Lord Macmillan expressed the view that the cyclist ought to have foreseen that his excessive speed might involve the possibility of collision with another vehicle, but that the appellant¹⁰ ‘was not so placed that there was any reasonable likelihood of her being affected by the cyclist’s careless driving.’

The result reached by these judgments can perhaps be summed up as follows: as the appellant was outside the area in which it was reasonable to foresee that she might be physically injured by the collision therefore the cyclist owed her no duty of care, including the duty not to administer a shock to her. According to this principle every shock case involves two questions: first, was it reasonably foreseeable that the plaintiff might be physically injured by the defendant’s negligent conduct, and secondly, did this negligent conduct give the plaintiff a shock and was it the kind of shock on which liability can be grounded. It is only if the first question is answered in the affirmative that the problem of liability for administering a shock can arise.

These three judgments are therefore not concerned with the question of shock at all, for their Lordships held that the appellant was outside the area of physical risk. They leave open the question whether the appellant could have recovered for the shock she suffered if she had been standing within that area, *e.g.*, twenty feet from the place of collision. At such a distance the cyclist would have been able to foresee

⁷ At p. 99.

⁹ At p. 102.

⁸ At p. 98.

¹⁰ At p. 105.

that she might have been injured by the collision, and therefore he would have owed her a duty of care not to injure her by physical impact. This would entail the further derivative question whether this duty of care also covered a shock of the nature suffered by the appellant in the present case. The same problem would have arisen if the appellant had been standing on the other side of the crossing, for their Lordships emphasized that as the cyclist had passed the appellant before the collision took place therefore he could not have foreseen the reasonable possibility of physical injury to her. Whether in such circumstances a person can recover for such a shock is thus still an open question so far as these judgments are concerned.

As this seems to be the first case in which the House of Lords has defined the area of risk with such precision, it may perhaps be asked how this test will work in practice. The importance of the case is therefore not limited to the comparatively few shock cases, but extends to all cases where the ambit of duty of care falls to be considered. For example, if the cyclist, instead of running into a motor car, had collided with a horse, and the frightened animal had run into the appellant would she have been held to be outside the duty of care? Apparently, if the words of the judgments are read literally, the answer must be 'yes,' yet there are many cases where persons have recovered damages in such circumstances.¹¹ In them the area of risk may extend to a number of miles, for the horse may run a long distance. Lord Thankerton seems to distinguish the present case on the ground that¹² 'the cyclist had his machine under his control, and this at once distinguishes this case from such cases as those where the motor has been left standing unoccupied and insufficiently braked, and has started off on an uncontrolled career,' but, with all respect, ought not the cyclist to foresee that if he negligently collides with a horse he may set it off on an uncontrolled career? Similarly, what would have been the legal position in the present case if, owing to the collision, the driver of the motor car, with which the cyclist collided, had lost control and had swerved forty-five feet in the appellant's direction? On this reasoning the cyclist would not have been held liable as, he having passed the appellant, she was outside the ambit of risk. But Dr. Cecil Wright cites a Canadian case¹³ in which X, the defendant, was held liable in similar circumstances because, although he had himself passed Y at some distance and there was therefore no danger that he himself might injure Y, nevertheless his careless driving caused Z to lose control of his car with the result that Z ran into Y.

This area test of duty of care may be a difficult one to apply where the defendant's foresight is not concerned solely with the physical distance between himself and the plaintiff, but is concerned with the existence of other material circumstances. Thus X, driving negligently, runs into

¹¹ *Haynes v. Harwood* [1935] 1 K. B. 146. and the other rescue cases are obvious examples.

¹² At p. 98.

¹³ *Harding v. Edwards and Tatisich* (1929) Ex. O. L. R. 98.

Y's lorry which he has been warned may be carrying an unexploded bomb. The bomb explodes, injuring A who is ten feet away, B who is forty-five feet away on the far side of a tramway car, and C who is sitting in a house 100 yards from the spot where the collision occurred. It is clear that A can recover as he is within the area of risk, but what of B and C? B is apparently at a safe distance so far as concerns any risk from the actual impact of the collision, and C is not on the highway, so that both are outside the duty of care as defined in the present case, yet it would be surprising if they failed to recover in these circumstances. It is suggested, with all respect, that any attempt to define an area of risk and then apply it as a test of duty of care is bound to lead to unsatisfactory results because the area of risk of one consequence may be far wider than is the area of risk of another. In the present case Lord Macmillan quotes¹⁴ with approval Lord Jamieson's statement that 'the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway . . .', but why should the driver's duty of care be limited to persons on or in premises adjoining the highway? It is true that in most cases he can only foresee that his negligence will affect those on the highway, but why should an arbitrary line be drawn which would exclude liability in cases where he should reasonably foresee that his negligence might affect persons outside the area? The difficulty is caused by failing to recognize that negligence is concerned with conduct involving certain risks of harm, and that it is not possible ever to consider negligence apart from its consequences. In other words there is no single area of risk because this may vary in accordance with the reasonable foresight of each separate consequence. The problem in such a case as the unexploded bomb would concern A's foresight in regard to the existence of the bomb, because if he had no reason to expect that by colliding with the lorry he would set off a bomb then he has not violated any duty of care so far as this particular consequence is concerned. This conclusion does not conflict with the often quoted *Palsgraf* case.¹⁵ In that case the defendant's servant, a railway guard, had negligently knocked a package out of a passenger's hands with the result that the package exploded and injured the plaintiff who was a considerable distance away. Cardozo C.J. emphasized that the guard did not know that the package contained an explosive and therefore that he had not been negligent in relation to the plaintiff; if he had been aware of that fact then presumably he would have been negligent in regard to the consequence of his act. It is therefore suggested that in negligence cases it is unsatisfactory to attempt to define any general area of risk, as this will vary, depending on the particular consequences which are under consideration; the simpler and more accurate test is: Would a reasonable man have taken care to protect the plaintiff against this particular

¹⁴ At p. 104.

¹⁵ *Palsgraf v. Long Island R. R.* (1928) 248 N. Y. 339; 162 N. E. 99.

consequence? If this consequence could not have been reasonably foreseen then there is no duty of care. It is submitted that the 'area of physical impact' does not furnish a satisfactory test when the consequence of the act under consideration consists of a nervous shock, because that area may be either too large or too small. By confusing physical impact with nervous shock we fail to deal with the essential problem which is: Ought a reasonable man have taken care to protect the plaintiff against this shock? It is this question which Lord Wright, and to a less certain degree Lord Porter, answered in their judgments.

IS THERE A DUTY NOT TO MAKE A LOUD NOISE IN THE HIGHWAY?

Lord Wright begins his judgment by rejecting the physical impact test, for, as he says,¹⁶ 'the ambit of the persons affected by negligence or misconduct may extend beyond persons who are actually subject to physical impact.' Thus¹⁷ 'the man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape, is committing a breach of duty towards every person who comes within the range of foreseeable danger, whether by impact or shock; but if there is no negligence or other default, there can be no liability for either direct impact or for nervous shock.' It follows from this that if a driver negligently causes a tiger to escape or a bomb to explode, having foresight that such a consequence might result from his act, he is liable not only to those on or near the highway but to all those who are endangered by the escape of the tiger or the explosion of the bomb. Why then if Lord Wright rejected the physical impact test did he hold in the present case that the appellant could not recover for the shock which she undoubtedly received? The answer is that the cyclist could not reasonably have foreseen that by making a loud noise he would cause a woman, either near or far away, to have a miscarriage. 'She merely heard a noise, which upset her, without her having any definite idea at all. . . . She saw nothing of the actual accident, or indeed any marks of blood until later. I cannot accept that John Young could reasonably have foreseen, or, more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the appellant was, could be affected in the manner in which she was.'¹⁸

Lord Porter, having pointed out that no exceptionally loud noise was alleged, expressed a similar view when he said that:¹⁹ 'The driver of a car or vehicle even though careless is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the

¹⁶ At p. 108.

¹⁸ At p. 111.

¹⁷ At p. 109.

¹⁹ At p. 117.

customary phlegm.' It may, perhaps, be suggested that Lord Porter takes an unduly Spartan attitude concerning the sight of injury to others, but there can really be no question that the making of a loud noise, provided that it is not exceptionally loud, cannot by itself be a ground for liability in negligence. If it were, then an unreasonable restriction would be placed on the ordinary driver, for his car may back-fire or he may be forced to brake hard in an emergency, but no one has ever suggested that he should be held liable for such noises.

The refusal to hold a person liable for such noises can be based either on the ground that he could not reasonably have foreseen the consequences, or on the ground that this is not a risk which the law can require a man to guard against. Perhaps the second ground is the sounder one, for it is certainly arguable that it is not unforeseeable that a sudden loud noise may frighten people. Nevertheless there is no duty of care against making such a noise because what is reasonable or not depends on the ordinary standards of life, and a standard which would prevent a motorist from making a noise would be an impossibly high one at present, although it may be attained in happier years to come. There is no such duty of care, because as Professor Winfield has said,²⁰ 'Duty means a restriction of the defendant's freedom of conduct; and the particular restriction here is that of behaving as a reasonably careful man would behave in similar circumstances.' A reasonably careful man would not feel that he had acted in a careless manner because he had made a noise.

In the present case the further question arose whether the cyclist owed the appellant a special duty of care because of the fact that she was pregnant. Lord Wright held that he did not, because the criterion of reasonable foresight does not²¹ 'take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen.' As this explanation may be subject to the criticism that it can be reasonably foreseen that a pregnant woman may be using the highway, it is perhaps safer and more accurate to base this conclusion on the ground that a user of the highway accepts the usual risks attached to it, and that he or she cannot claim more than the ordinary degree of care whatever his or her condition may be. Phillimore J. made this point, with his accustomed caution, in *Dulieu v. White & Sons*²² when he said: 'It may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors. If not fit for the streets at hours of crowded traffic, he or she should not go there.' This is an important point, because it was due to the fact that the Court of Appeal did not follow this rule in *Owens v. Liverpool Corporation*²³ that such a surprising result was reached in that case, a result which their Lordships in the

²⁰ (1934) 34 Columbia L. R. 41, 43, *Duty in Tortious Negligence*.

²¹ At p. 109.

²³ [1939] 1 K. B. 394.

²² [1901] 2 K. B. 669, 684.

present case seemed to view with disapproval. In the *Owens*' case it was held that the relatives of a dead man could recover damages for shock suffered when they realized that his coffin had been overturned in a collision between the hearse and the defendants' tramcar. MacKinnon L.J., in delivering the judgment of the Court, accepted the view that such a violent shock was due to the fact that²⁴ 'the plaintiffs are of that class which is peculiarly susceptible to the luxury of woe at a funeral so as to be disastrously disturbed by any untoward accident to the trappings of mourning.' This peculiar susceptibility on the part of the plaintiffs did not excuse the defendants because 'one who is guilty of negligence to another must put up with idiosyncracies of his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one.' With all respect, this argument fails to recognize the point that there has been no negligence unless the act is one which would have shocked the ordinary man: it is not necessary in one's everyday conduct to guard against the idiosyncracies of one's neighbours. It was because this point was forgotten that the *Owens*' case seemed to open the floodgates for a wave of 'shock' litigation, but fortunately this danger has been avoided by the opinion expressed by the House on this point in the present case.

HOW WILL THE BOURHILL CASE BE INTERPRETED IN THE FUTURE ?

Although Lord Wright and Lord Porter may be said to have been in a minority concerning the grounds on which the *Bourhill* case was decided, nevertheless it is believed, with all respect to the majority, that it is their judgments which will be regarded as containing the more satisfactory explanation of this interesting case. Apart from any other consideration, there is the advantage of simplicity. It is not difficult to state that it is not negligent to make a loud noise while driving on the highway (although, for other reasons, it required twenty-five pages in the House of Lords to reach this conclusion), but it is a far more complicated task to explain what are the limits of the area of physical impact and how this affects the duty of care. Professor Winfield adopts the first alternative when he epitomises the decision in the present case as holding that the duty²⁵ 'must generally depend on a normal standard of susceptibility' (Lord Wright), and that if no reasonable person would have foreseen the shock to X, no duty arises on Y's part to take care to prevent it.

Although in the present case the same conclusion was reached both by 'the area of physical impact' test and by 'the reasonable foresight of shock' one, nevertheless in other cases the difference between them may be of great practical importance. Thus, in the American case of

²⁴ At p. 400. Cf. (1943) 59 L. Q. R. 150; Charlesworth, *Bourhill v. Young*, where a view, contrary to that expressed in this article, is stated.

²⁵ *Law of Tort*, 2nd ed., p. 89.

Waube v. Warrington,²⁶ a mother, standing at the window of her house, saw her child killed on the road. The Court, adopting the area of physical impact principle, held that as she herself had not been in danger she could not recover damages for the shock she had suffered, although she would have been able to do so if she had been standing ten feet away on the pavement. In more recent American cases doubt has been cast on the soundness of the *Waube* case as being too restrictive in character.²⁷

On the other hand, 'the area of physical impact' principle may prove to be too wide in certain circumstances. Perhaps the *Owens*' case²⁸ as decided in the Court of Appeal may be explained on this ground. The mourners were within a few feet of the hearse and might therefore have suffered some physical injury from the collision: it might therefore be said that as users of the highway they were owed a duty of care by the defendants. Nevertheless that decision, in the opinion of their Lordships in the present case, went too far, and although they gave no specific reasons for this conclusion, we suggest that it was based on the ground that this was not the kind of shock which an ordinary man would suffer.

ON WHAT TYPES OF SHOCK CAN LIABILITY BE GROUNDED ?

Although the majority of their Lordships were not concerned in the *Bourhill* case with the question of liability for shock, holding as they did that the plaintiff was outside the area of risk, and the minority held that the particular kind of shock which fell to be considered could not be regarded as one which an ordinary person would suffer, nevertheless it is clear that all five of their Lordships assumed that in certain circumstances damages could be recovered for injury caused by shock, even though there had been no physical impact. Thus Lord Macmillan said that²⁹ 'it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact.' This raises the further question as to what shocks will give rise to such an action. On this it is not possible to speak with any certainty, but the following points may be suggested.

(a) A shock caused by fear of immediate physical injury to oneself is sufficient to ground liability. All their Lordships were prepared to assume that *Dulieu v. White & Sons*³⁰ had been correctly decided. This is the first opportunity which the House of Lords has had of refusing to follow the doctrine stated by the Privy Council in *Victorian Rys. Comrs. v. Coultas*.³¹ Although it was a foregone conclusion that it would refuse to do so, it is nevertheless satisfactory to have all doubts removed on this point.

²⁶ (1935) 216 Wis. 603; 258 N. W. 497. The American cases are discussed by Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harvard L. R. 1033. The American cases on the whole favour the ambit of possible physical impact test.

²⁷ For the more recent American cases, see (1938) 48 Yale L. J. 303.

²⁸ *Supra*, n. 23.

²⁹ At p. 103.

³⁰ *Supra*, n. 22.

³¹ (1888) 13 App. Cas. 222.

(b) A shock caused by witnessing an accident to one's immediate family is probably sufficient, although the question is still an open one. *Hambrook v. Stokes Brothers*³² was discussed by their Lordships, but no definite conclusion was reached. Lord Wright and Lord Porter approved, Lord Russell of Killowen disapproved, while Lord Thankerton and Lord Macmillan expressed no opinion.

(c) A shock caused by seeing an accident to third persons may or may not be sufficient. Apparently Lord Porter's man of customary phlegm can endure such incidents with fortitude, but Lord Wright's ordinary man is more easily affected by the sufferings of others. Having recently witnessed a man being crushed by a heavy lorry, we respectfully feel that there is much to be said for Lord Wright's view.

(d) A shock which does not involve fear of injury to life or person is probably not sufficient. The strong disapproval expressed by their Lordships of the conclusion reached in the *Owens'* case³³ is a warning against the extension of the liability for shock to such facts.

(e) Shock caused by the report of an accident or by witnessing its after-effects is not sufficient. In the present case the appellant saw a pool of blood on the road after she had heard of the accident, but their Lordships, without discussing the point, assumed that a shock caused in such a roundabout manner could not be a ground for liability. The refusal to recognize such indirect shocks is not based on the argument that such a consequence is not reasonably foreseeable, for we are all careful to break bad news as gently as possible, but is justified on the ground that the law must draw a line which is a practical one for ordinary purposes. To allow recovery for shock due to secondhand reports would be to extend the field of liability to a dangerous extent, and—what is even more important—it would be difficult to test the validity of such claims.

THE RULE IN *RE POLEMIS*³⁴

Just as it has been the practice in the past to cite the rule in *Rylands v. Fletcher*³⁵ in most negligence cases, whether it was relevant or not, so to-day few tort cases can be regarded as having been properly argued unless some reference is made to *Re Polemis*. It was therefore inevitable that it should be discussed in the present case, but their Lordships held that the question concerning direct consequences did not arise. Nevertheless Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Porter gave some indication that it was not safe to assume that they would adopt this doctrine when it fell for them to decide the point.

³² [1925] 1 K. B. 141.

³⁴ [1921] 3 K. B. 560.

³³ *Supra*, n. 23.

³⁵ L. R. 3 H. L. 330.

WARRANTIES OF LAND IN THE THIRTEENTH CENTURY¹

S. J. BAILEY

IN its ordinary form, the warranty of land was an obligation, owed to the tenant of certain land, to defend him in his possession of that land against all men. This obligation to warrant was primarily, therefore, an obligation to come into Court, if called upon ('vouched') by the tenant, in order to defend some action brought against him for the possession of that land.

The warranty of land has been described as 'one of the most curious and cunning learnings of the law, and of great use and consequence.'² It is now obsolete. Nevertheless, it has left its mark upon the modern law, for it was of the first importance when our land law was taking shape.³ The present essay is an endeavour to trace the bounds of the law of warranty as it existed in the thirteenth century in relation to land,⁴ and to show something of its practical application in the litigation of that period. The law of warranty at that time was as yet comparatively simple. Thereafter it became more complex and mysterious, and so tends to obscure to modern eyes the significance of much of the abundant litigation on the law of property that occurred in the fourteenth and subsequent centuries.

Among the achievements that may be credited to the law of warranty are (i) the rule that a gift 'to A and his heirs' gave no estate by purchase to A's heir and could be alienated by A without the heir's consent;⁵ (ii) the theory that, in such a case, a purchase from A (even before *Quia Emptores*) could not be contested by A's lord;⁶ (iii) the barring of fees

¹ The following abbreviations are used throughout this article:—Bract. (Bracton's *De Legibus*, etc.); B. N. B. (Bracton's Note Book, ed. Maitland); Glanv. (Glanvill's *De Legibus*, etc.); Hengham (*Radulphi de Hengham Summae*, ed. Dunham); H. E. L. (Holdsworth's History of English Law); Law Tracts (Four Thirteenth Century Law Tracts, ed. Woodbine); P. and M. (Pollock and Maitland's History of English Law); R. S. (Rolls Series); S. S. (Selden Society's Series).

² Co. Litt., f. 366a.

³ Bracton, for example, refers to this topic repeatedly throughout his *De Legibus*, and devotes 20 folios to it exclusively.

⁴ Voucher to warranty was possible also, in the criminal law of this period, as to goods alleged to have been stolen: P. and M. i, 36—37; *ibid.* ii, 156—164, 207—208, 660; Glanv. 10, cc. 15—17; Bract. ff. 150b—151b; Britton, 1, cc. 16, 25; Fleta, 55, 56; S. S. 56 (Eyre Rolls, 1218—1219), pl. 393 (duty to warrant a hawk). The author of the Mirror of Justices considered this an abuse of the law: S. S. 7, p. 166.

⁵ 2 Blackstone's Commentaries, 300—301; 3 H. E. L. 105.

⁶ The lord will have warranted (expressly or by implication) to A and his heirs. A's purchaser will receive from A a warranty binding upon A and his heirs. Consequently, so long as A and his heirs endure, the purchaser can vouch them to warrant him against the lord and they can do so effectively: Britton, 2, c. 4, § 2. If A's heirs fail, however, the purchaser cannot resist the claim to an escheat, unless the lord's original gift (with warranty) had been to A and his heirs 'and assigns'—so that A's purchaser had himself a warranty direct from the lord: *ibid.* 2, c. 6, § 1. The threat of escheat for want of heirs was strongest if A was a bastard; for such can have no heir save an heir of his body: S. S. 3 (1201), pl. 205. Hence it was said that the mention of 'assigns' in a gift was

tail, both before⁷ and after⁸ *De Donis* (there is, incidentally, a case material to warranty that brings to mind a recent article in this JOURNAL⁹); and (iv) a number of other less striking influences upon our property law.¹⁰ The modern doctrine of covenants running with land, moreover, probably derives¹¹ from theories evolved in the thirteenth century whereby the benefit and possibly the burden of warranty might run with land which it concerned.¹² And one variety of such covenants, the covenant for title, strove for a time in competition with the warranty and ultimately supplanted it.¹³

§ 1.—EXPRESS WARRANTIES

An express clause of warranty became customary in charters of

invented for the bastard: Bract. f. 20b; Britton, 2, c. 3, § 5, c. 16, § 3. Cf. *Modus Componendi Brevia*, Law Tracts, 147. See also note ²⁹, *post*.

⁷ E.g., Bract. f. 17b. Note that the term 'fee tail' existed before *De Donis*. It was used (as opposed to *maritagium*) by another chapter of that same statute: Stat. Westm. II (1285), c. 4 (as to remedies against lands recovered by default). The term 'fee tail' derives from the old theory that a gift 'to A and the heirs of his body' gave to A a mere freehold (i.e., life estate), the fee remaining in the donor until the birth of an heir of A's body, whereupon the fee vested in that heir. The fee, therefore, was 'cut down and in suspense' until the condition (birth of issue) occurred: Britton, 2, c. 3, § 9; also Berewike J., Y. B. 22 Ed. I (1294), R. S., at p. 322. Bracton, *supra*, had said that the heir of the body gets nothing except by succession from A; so also Britton, 2, c. 5, § 1. Nevertheless, the old theory died hard, even after *De Donis*: Y. B. 20 Ed. I (1292), R. S. 58—60 (counsel contend on the point, and Berewike J. evades it); Y. B. 22 Ed. I (1294), R. S. 570—576 (counsel asserts the old theory, and his opponent and the Court seem to accept it). See Maitland, B. N. B. i, p. 133, that the theories of Coke and later writers as to the nature of fees conditional at common law seem to be 'hardly more than guess-work' deduced from the preamble of *De Donis*.

⁸ The warranty was an integral part of the common recovery. See also H. W. Elphinstone, 6 L. Q. R. 280, for the barring of entails by a warranty without either fine or recovery.

⁹ 7 C. L. J. 238—242, 'Formedon en Remainder at Common Law.' The learned author, having found a specimen writ, argues therefrom that Challis was wrong in stating that the writ of *formedon en remainder* did not exist prior to *De Donis*. It seems that two points should be added to this. (i) Even if the writ given (at p. 241) was drafted for use by a remainderman, it does not follow that it was at that time a writ *de cursu*: see Bereford J., Y. B. 22 Ed. I (1294), R. S., at p. 322, that before 1285 the Chancery was willing to issue special writs for special cases of hardship (e.g., to the issue in tail) which were not covered by any of the writs commonly in use. (ii) It does not seem entirely certain that the writ shown was in fact intended for a remainderman. It may have been merely for the survivor of two joint tenants in tail; for its form and recitals are not inconsistent with this. The word '*remanere*' at that period signified only that the land ought to continue to remain away from the donor (2 F. and M. 21); and a statement that a plaintiff was entitled '*per formam donationis*' did not necessarily indicate that he was a remainderman.

¹⁰ The frequent efforts of husbands to alienate their wives' inheritance or to deprive them of their dower are by far the most numerous instances of litigation as to warranties during the thirteenth century. The liability of an heir for the debts of his ancestor (if expressly bound by specialty) seems to have been modelled on the liability of an heir to warrant: the rule in Bract. f. 61 shows a striking similarity of reasoning. See also Plucknett, Concise History of the Common Law (ed. 2), 552, note 1, for a suggestion that the modern term 'assets' derives from warranty law.

¹¹ The modern rule that the benefit of a covenant concerning land runs at law with the estate, not with the land itself (see 6 Cambridge Law Journal, p. 348), clearly derives from warranty law: see Holmes, Common Law, 380 *et seq.*; also note ³⁶, *post*. As regards covenants between lessor and lessee, see also 7 H. E. L. 251, that the modern implied covenant for quiet enjoyment probably derives from the old implied warranty in a gift by subinfeudation (*post*, § 2). Also 7 H. E. L. 290, that that part of *Spencer's Case* which required 'assigns' to be mentioned is a reversion to Bracton's theories about warranty.

¹² §§ 6, 7, *post*.

¹³ 2 Blackstone's Commentaries, 303—304.

feoffment at the beginning of the thirteenth century.¹⁴ By the end of the century, such clauses had become almost universal.¹⁵ Thus Bracton tells his readers that such a clause is 'often' included¹⁶ and is effectual whether the conveyance concerned is a sale, a gift, or an exchange.¹⁷ Moreover, he says, if the grantor thereby purports to bind to warranty both himself and his heirs, the warranty binds the heirs *ad infinitum*.¹⁸ And he emphasizes the two important undertakings that such a clause should contain: (i) the words 'we will warrant,' which impose a duty to defend the tenant in his possession in case anyone should subsequently claim the tenement from him in demesne; (ii) the words 'we will acquit,' whereby an obligation arises to acquit the tenant should anyone (*e.g.*, the chief lord) claim from him any additional or excessive service beyond that which is mentioned in the charter.¹⁹ It will be remembered that it was not unusual, at this period, for a grantee to obtain, besides the feoffment and charter of his grantor, a charter of confirmation from the grantor's lord. Such charters of confirmation might themselves contain a clause which effectively bound the lord and his heirs to warrant the grantee in his possession.²⁰ A writer of the period remarks that, although it is foolish of the lord to undertake such an obligation, it is a valuable advantage to the grantee—particularly if his grantor is weak and has not the means wherewith to warrant him.²¹

The clause of warranty was ordinarily a warranty 'against all men for ever.'²² But a warranty might be less extensive: *e.g.*, 'against all men except X,'²³ or 'against X and his heirs' only;²⁴ or, in a gift to A for

¹⁴ 2 P. and M. 311. Probably the desirability of having an express warranty from one's feoffor was one of the important factors which encouraged the use of charters to record that a feoffment had been made. The feoffment with due livery of seisin, not the charter, conveyed the land; and it was an effective conveyance whether followed by a charter or not: Bract. f. 33b; 2 P. and M. 82.

¹⁵ 3 H. E. L. 160—161. This was due to the very limited scope of the implied warranty on a feoffment by way of substitution: *ibid.*; also § 2, *post*.

¹⁶ Bract. f. 37, § 10.

¹⁷ Bract. f. 380b, § 3.

¹⁸ Bract. f. 37, § 10.

¹⁹ *Ibid.* A charter of feoffment ought to state expressly, besides any service reserved to the grantor, any services the donee is to do to the chief lord. Thus, a charter recording a grant in frankalmoign is likely to contain a clause of express warranty and acquittance 'free of all service and worldly exaction': see S. S. 56 (Eyre Rolls, 1218—19), 105—107, for three such charters enrolled *in extenso*.

²⁰ Bract. f. 389. See B. N. B. (1226—1227), pl. 1881, for a successful action upon such a warranty. But charters of confirmation or of quitclaim were invalid at this period, unless made by one who had right to one who was in seisin: Britton, 2, c. 8, § 9.

²¹ *Judicium Essoniorum* (1267—1275), ch. 8, Law Tracts, 137—138. Woodbine suggests that Hengham probably wrote this tract: *ibid.* 28—36.

²² See S. S. 53 (Eyre Rolls, 1219), 396—398, for two such charters (gifts by subinfeudation by a father to his two sons) enrolled *in extenso*.

²³ Bract. ff. 37b, 390. Even if the express warranty was in form absolute, the Courts would construe it as limited by the terms of the grant. Thus a charter of grant made by A to B and his heirs 'saving the right of the heirs of W. G.' with clause of warranty against all men, did not bind A's heir to warrant B's heir when the latter was sued by an heir of W. G.: so held in B. N. B. (1222), pl. 196, and S. S. 59 (Eyre Rolls, 1222), pl. 1468, which appear to be reports of the same case; also B. N. B. (1225), pl. 714.

²⁴ B. N. B. (1228), pl. 284: the widow of X sued for her dower; held, since she is not the heir of X, the defendant cannot vouch the warrantor. See also B. N. B. (1225), pl. 714.

life, might be expressly restricted to *A*'s lifetime.²⁵ Moreover, an undertaking to warrant out of certain named land²⁶ was effective to restrict the warranty so that no warrantor would be liable to make compensation for a breach of the warranty unless he held the land in question.²⁷

Round about the year 1200,²⁸ it had become customary in charters to state that the grant had been made to the grantee and his heirs and (at first more commonly 'or') *assigns*.²⁹ Accordingly, one begins to find extended clauses of warranty in which the feoffor undertakes that he and his heirs will warrant, *etc.*, not only to the feoffee and his heirs but to his assigns also.³⁰ The precise effect of this extension will be considered below.³¹ Meanwhile, it may be noted that this mention of 'assigns' was equally effective whether used in a charter of feoffment or in a charter of confirmation.³² In either case, however, Bracton and other writers are clearly of opinion that, unless the warranty is framed still more extensively, the only assign who can claim to benefit is an immediate assign of the original donee.³³ This somewhat pedantic theory probably did not endure for long. As early as the year 1292, counsel failed to convince Cave J. that the heir of the donee's assign could not benefit under such a clause of warranty.³⁴ On the other hand, the rule that no assign of the donee's estate can enforce a warranty which mentions only

²⁵ S. S. 53 (Eyre Rolls, 1219), 388—390, a charter of grant enrolled *in extenso*. See also Bract. f. 37b, for further examples of such restricted warranties.

²⁶ *E.g.*, B. N. B. (1228), pl. 290; *ibid.* (1233), pl. 748.

²⁷ See Y. B. 22 Ed. I (1294), R. S. 492—494; also *post*, § 6.

²⁸ 2 P. and M. 31f.

²⁹ The form Bracton ordinarily gives is 'or to whomsoever he may give or assign it': Bract. ff. 17b, 20b, 29b—30, 47b; see also S. S. 53 (Eyre Rolls, 1219), pl. 556. The disjunctive was probably due to the fact that originally the assigns contemplated were the assigns of the original grantee only (so that if he died without heirs his assignee might hold as quasi-heir): see *ante*, note 6; Holmes, Common Law, 372—375; but cf. S. S. 56 (Eyre Rolls, 1218—1219), 421—422, an enrolled charter of gift to *A* 'and his heirs or their assigns.' When Britton wrote (*circa* 1290), 'and' had become fashionable (Britton, 2, c. 4, § 1, 6, § 1); and one is recommended to use very extensive phraseology, *viz.*, 'to have and to hold to the purchaser his heirs and assigns, and to the heirs and assigns of his heirs, and to the heirs and assigns of his assigns' (*ibid.*); see also Fleta, 3, c. 12, § 1. Presumably all this complication disappeared when the effects of *Quia Emptores* were fully realized. Before *De Donis* a grant might even be made to *A* 'and the heirs of his body and his assigns': Calendar of Charter Rolls, R. S. 2 (1281), 254—such a grant by the King to *A*, who subsequently assigned to his brother and his heirs: *ibid.* (1290), 366. See also *ibid.* (1271), 175: a gift by a subject to *A* and the heirs of his body 'and the assigns of the said heirs.'

³⁰ *E.g.*, S. S. 56 (Eyre Rolls, 1218—1219), 419—421: an enrolled charter recording that the donor has given certain property to *X* 'and his heirs or their assigns,' and that he and his heirs will warrant it to *X* 'and his heirs and their assigns' against all men for ever. See also Y. B. 20 Ed. I (1292), R. S. 232—238 (warranty to *X* 'and to his heirs and to his assigns'); Y. B. 22 Ed. I (1294), R. S. 570—576 (two examples of express warranty to *X* 'and his heirs and assigns'). Cf. B. N. B. (1226—1227), pl. 1881 (warranty 'to the Abbot and his successors').

³¹ See *post*, § 7; also Bract. f. 37b.

³² Bract. f. 381b.

³³ Bract. f. 37b; Britton, 2, c. 6, § 1; Fleta, 3, c. 14, §§ 10, 11. In order to be available to the heirs of such assigns and to the assigns of such assigns and their heirs, the warranty (we are told) must expressly include them.

³⁴ Y. B. 20 Ed. I (1292), R. S., at p. 234: 'The heir of the assign is the same as the assign . . . but it would be otherwise of the assign of an assign.' Even Bracton seemed to say this in one passage: f. 381b, § 1.

the donee and his heirs³⁵ endured, and its influence has persisted into modern times.³⁶

§ 2.—IMPLIED WARRANTIES

We now turn to the circumstances in which a duty to warrant might arise by implication. Of these, the most important when our period began—and perhaps the oldest in this country³⁷—was the doing and receipt of *homage*. There is no doubt that *A*, having enfeoffed *B* for his homage and service, was ordinarily bound, on taking his homage, to warrant and acquit *B* against all men, unless he had made a special stipulation to the contrary:³⁸ and this whether or no *A* had made any charter of the feoffment to *B*, his tenant.³⁹ So far the authorities are unanimous. But whether such a warranty will arise on the death of either party, when his heir does or receives homage for the land, is less easy to ascertain.⁴⁰ It seems clear, however, that, on the death of the original donor-lord (*A*), his heir can be compelled to take the donee's homage,⁴¹ and that until he does so he is not bound to warrant the donee-tenant or his heir⁴²—though it may be that he is barred in any case from himself claiming the land from the donee.⁴³ Similarly, when the donee dies, his heir appears to have no right to vouch the donor-lord

³⁵ Bract. f. 37b.

³⁶ Sect. 58 of the Conveyancing Act, 1881 (now L. P. A., 1925, s. 78), was enacted in order to render unnecessary the use of the words 'heirs and assigns' when drafting a covenant the benefit of which was intended to run with land: see *Dyson v. Forster*, [1908] 1 K. B. 629, C. A.; also Wolstenholme and Cherry, *Conveyancing Statutes*, ed. 12, 358—360. The conception that covenants can run with land derives from the law of warranty—note ¹¹, *ante*. Holmes, *Common Law*, 380 *et seq.*, shows that the doubt that existed in his day as to whether the word 'assigns' was (as in warranty) vital in order to enable a covenant to run with land, was due to confusing covenants with incorporeal hereditaments.

³⁷ See *e.g.*, Twiss, *Introduction to Bracton*, *De Legibus*, R. S. VI, pp. ix—xiii.

³⁸ Glanv., 9, c. 4; Bract. ff. 37b, § 11, 48b, 380b, 382, § 4, 389, 390, 390b. 'If one enfeoff me of land to hold by homage and rent, I shall bind him if I be impleaded': Y. B. 21 Ed. I (1293), R. S. 90, *per* Metingham J. The reason why those who spoke of a homage-warranty usually referred to service done, as well as to homage taken, is to be seen in the rule that homage raises a duty to warrant the tenant in consideration of the services due from him: Bract. f. 78b, § 2; Britton, 3, c. 4, § 1. Clergy holding lands in right of their churches did fealty instead of homage; but a like warranty was implied: Britton, 3, c. 4, § 9; *Exceptiones ad cassandum Brevia*, Law Tracts, 178; S. S. 53 (Eyre Rolls, 1219), pl. 372.

³⁹ Bract. f. 382, § 4.

⁴⁰ Some statements that homage implies a warranty are ambiguous in that they do not show clearly whether they refer only to homage done between the original donor and donee: *e.g.* Bract. f. 389; *Judicium Essoniorum*, c. 8, Law Tracts, 318. There is also a mysterious statement by Glanvill (Bk. 9, c. 4) to the effect that homage received of an heir as heir implies no duty to warrant. The Statute of Wales, 1284, cc. 7, 8, seemed to enact for Wales that anyone seised of another's homage is bound to warrant him; but this informative little statute, enacting for Wales the main concepts of our English Property Law, was probably attempting to do no more than describe in very bare outline those topics of English law which, thereafter, were to be law in Wales also.

⁴¹ *E.g.*, S. S. 53 (Eyre Rolls, 1219), pl. 556—by action *de warrantia cartae*. But *semble*, the donor's heir receiving such homage could expressly exclude any liability to warrant: S. S. 59 (Eyre Rolls, 1222), pl. 1468—limited homage-warranty by donor's heir held to negative the implied duty to warrant.

⁴² Hengham *Magna*, c. 13, p. 49: homage does not oblige nor bar anyone, except in so far as he received it, *etc.*

⁴³ *Fet Asaver*, Law Tracts, 95—97, to the effect that a daughter enfeoffed by her father for her homage and service would be safe against his heirs. But contrast the preceding footnote.

(or his heir) to warrant him against others until he has done him homage; but the lord is barred nevertheless from claiming the land for himself in the meantime,⁴⁴ and is compellable to take the heir's homage as soon as it is clear that he is indeed the true heir.⁴⁵ If there be several claimants to the inheritance and the lord rashly takes the homage of one of them, having reason to suspect that another may in fact be the rightful heir, he is evidently in a difficult position—even, perhaps, if he took that homage expressly 'saving the right of all others.'⁴⁶

The position as to homage, then, was this: so long as homage was taken afresh (and without reservation) when a deceased lord or tenant was succeeded by his heir, the heir for the time being of the original donor-lord was bound to warrant the heir for the time being of the original donee-tenant.⁴⁷ There remains the question whether homage given or taken by an *assignee* of the tenant or lord was as effective to raise a warranty as was homage between the heirs of the original donor and donee. To this the answer seems clear. Homage given or taken by an assignee ordinarily implied no warranty whatever except, perhaps, where the lord had assigned his seignory by a fine made in the King's Court.⁴⁸ The fact that an assignment out of the line of heirs of the original donor or donee thus destroyed any existing case of homage-warranty, coupled with the enactment of *Quia Emptores* whereby no further subinfeudations (and hence no further tenancies by homage) could be created, led naturally to a decline in the importance of the homage-warranty after the thirteenth century. Eventually it becomes a thing of mystery and surmise; and writers of repute are inclined to imagine that it derives from some

⁴⁴ *Exceptiones ad Cassandum Brevia*, Law Tracts, 177. So long as the heir was under age, however, this question did not ordinarily arise; for (unless he held in socage) the lord's right of wardship entitled him to hold the land.

⁴⁵ Bract. f. 78; but see preceding note.

⁴⁶ This was evidently a burning question towards the end of the century. Britton says that the lord must warrant in such a case, even though the terms in which he received the homage purported thus to exclude any warranty, unless he did not know and had no reason to believe that there was a nearer heir: Britton, 3, c. 6, § 2; also Fleta, 5, c. 1, § 6; Y. B. 21 Ed. I (1293), R. S., 440—448. The author of the Mirror of Justices says that it is an abuse that the lord of a fee should ever be liable to warrant by the receipt of homage from one who is not the right heir: S. S. 7, p. 176. See also Bract. f. 390 b, § 10.

⁴⁷ In one passage Bracton (f. 17) gives an illustration of a gift for homage and service followed by a charter containing an express clause of warranty from the donor and his heirs to the donee and his heirs. This suggests that the limitations of the pure homage-warranty were thought to be a disadvantage.

⁴⁸ That the tenant's feoffee obtained no warranty by doing homage, see Hengham, *Magna*, c. 13, pp. 48—49; Britton, 3, c. 4, § 2; Y. B. 21 Ed. I (1293), R. S. 440—448. That homage done to the lord's assignee implied no warranty, see B. N. B. (1224), pl. 945 (seignory assigned by attorning the tenant); Y. B. 21 Ed. I (1293), R. S. 90 (to issue as to whether the lord's father enfeoffed the tenant's father for homage and service out of his own seisin, or whether the lord's father took that homage merely as lord). Although an assignment of the seignory by a fine followed by an attornment in Court ordinarily discharged the original lord and his heirs from the burden of the warranty (see note ¹³⁵, *post*) and perhaps raised a warranty from the assignee (see annotation to Britton, 3, c. 4, § 2), he did not escape from it when his lordship was extinguished through his failure to acquit the tenant in a writ of *mesne*: Stat. Westm. II, 1285, c. 9. *Aliter* if the tenant voluntarily adhered to the superior lord of the fee: B. N. B. (1233), pl. 734. If the lordship was extinguished by escheat, it seems that the superior lord was bound both to take the tenant's homage and (by implication) to warranty: Bract. ff. 80b, § 12, 389.

peculiar form of tenure, which ought to have a special name of its own.⁴⁹ The so-called 'Homage Ancestral' was not a special kind of tenure. The term 'homage ancestral' is admittedly an illuminating description of the only circumstances in which a tenant, holding by a normal tenure that involved homage, obtained a warranty by doing homage to his lord. It is nothing more.

A second case of warranty by implication is the *Fine*. It was a common practice in the thirteenth century to strengthen a conveyance by 'levying a fine'—a fictitious action in which the grantee might sue the grantor for the land and the grantor admit in Court the grantee's right to it.⁵⁰ The grantee's title to the land is thus confirmed by a judgment of the King's Court, and a document (a 'chirograph') is drawn up in Court setting forth his title. In most circumstances, such a fine barred any adverse claim against the grantee, whether by the grantor or his heirs or (after a year and a day) by any third party.⁵¹ Consequently, the question whether the grantor and his heirs will be bound to warrant and defend the grantee and his heirs against adverse claimants was not very likely to arise in practice. Bracton states clearly, however, that a chirograph and fine made in the King's Court between a grantor and grantee imposes a duty upon the grantor and his heirs to warrant the grantee and his heirs,⁵² whether or not there was any express warranty or homage between them.⁵³

Thirdly, warranties might be implied from the nature of the conveyance or from the words used by the charter that records it. Thus a conveyance which, expressly or by implication, showed that the grantee was not to be liable to perform any service or not more than certain specified services, impliedly gave to the grantee a right to be acquitted by the grantor against any exaction demanded of him beyond those (if any) specified in the gift. This is almost self-evident; but Bracton goes even further. In such a case the grantor is bound also to warrant and defend the grantee

⁴⁹ This confusion evidently developed from ambiguous or evasive statements to be found in the earlier books: e.g. 'Homage Ancestral implieth a warranty,' Fitzherbert, *Natura Brevium*, 134r. Littleton, Bk. 2, c. 7, includes it in his classification of tenures. Hargrave and Butler's note 315 to Co. Litt., f. 365a, and 2 Blackst. Comm. 300, give the same impression, but do not specifically say that it is a distinct tenure. Holdsworth described it as a tenure (2 H. E. L. 576), but adds a footnote: 'it really seems to be a case, not of a separate tenure, but of a tenure of one of the recognized kinds which has existed before the time of legal memory.'

⁵⁰ This, the simplest variety of Fine, is, I think, the commonest type in the thirteenth century. The fictitious action at this period is usually founded either upon a previous covenant to give the land or upon the warranty contained in the charter of feoffment that the grantor has already made. The grantor-defendant admits in Court that the land belongs to the grantee-plaintiff by virtue of his former gift or grant. This kind of fine was therefore described as '*sur cognizance de droit come ceo que il ad de son don*.' An example is Y. B. 21 Ed. I. (1293), R. S. 3—4. See further 3 H. E. L. 238 *et seq.*

⁵¹ Bract. ff. 435b—437; *Modus Levandi Fines* (statute of uncertain date: 1289?).

⁵² Bract. f. 382, § 6. See, e.g., B. N. B. (1223), pl. 1652: the heir of a grantor (whose grant had been confirmed by a fine) is here compelled, by an action on the fine, to take the grantee's homage and acquit him against the superior lords.

⁵³ Bract. f. 389; also Hengham, *Magna*, c. 13, p. 44 (one who has both a warranty by charter and a fine, can vouch on the chirograph of the fine if he have lost his charter by fire or other misfortune). But the chirograph of a fine sometimes contained an express warranty clause, e.g., S. S. 55 (1279, K.B.), pl. 37.

in his seisin—and apparently against all men.⁵⁴ Such implied duties to warrant and acquit arose (i) if the grant was in frankalmoign⁵⁵ or in frank-marriage,⁵⁶ or (ii) where the charter of feoffment stated that the feoffee was to hold ‘by the aforesaid service,’⁵⁷ or (iii) where it stated that he was to hold ‘freely.’⁵⁸ Apparently the burden and benefit of such warranties extended also to the heirs of the parties, if the gift had mentioned them.⁵⁹ On the other hand, there might be something in the charter which would negative the implication of a warranty or restrict its scope.⁶⁰

The most celebrated instance of warranties thus arising by implication from words used in a charter of feoffment turns upon the word ‘*dedi*.’ By the Statute of Bigamy, 1276,⁶¹ a charter of feoffment in which the feoffor uses the words ‘*dedi et concessi*,’ and in which no homage is reserved to the feoffor and no express clause of warranty is included, implies a warranty. This implied warranty binds only the feoffor himself, if the gift is to be held direct of the chief lords; it binds also his heirs, if the feoffee is to hold of him and his heirs by a certain service.⁶² This statutory rule was not a complete novelty,⁶³ nor did the statute purport to be exhaustive. Earlier writers had already recorded that a donor and his heirs are bound to warranty in every ‘charter of simple donation,’ except where the charter says the contrary;⁶⁴ and even the donor’s lord who elects to confirm the gift is impliedly bound to warrant it if his charter of confirmation purports to be a ‘gift and confirmation’

⁵⁴ Bract. f. 48. He does not say specifically that the warranty avails against all men; but this is clearly implied, I think. See also *ibid.* f. 38; B. N. B. (1224), pl. 1000.

⁵⁵ Bract. f. 48; B. N. B. (1226), pl. 1752.

⁵⁶ Bract. ff. 22, 48. A gift ‘*in maritagium*’ was the customary form of marriage settlement made by a father upon his daughter’s marriage: usually to her and her husband and the heirs procreated of the marriage. If ‘*in liberum maritagium*,’ the father thereby bound himself and his heirs to acquit, of all services due to the superior lords of the fee, both the donees and the heirs of the marriage until the third heir inclusive: *ibid.* f. 48.

⁵⁷ Bract. ff. 38, 48. One gets from the cases an impression that such phrases as ‘*pro omni servicio*’ are equally important: B. N. B. (1224), pl. 1000; *ibid.* (1227), pl. 1900; *ibid.* (1231), pl. 531; *ibid.* (1231), pl. 657.

⁵⁸ B. N. B. (1226), pl. 1717: the gift here was not in consideration of homage, nor was there an express warranty.

⁵⁹ B. N. B. (1226), pl. 1717 (heir must warrant heir); *ibid.* (1227), pl. 1811 (heir need not warrant heir, because the charter of gift did not ‘make mention of’ the heirs of the donee). This latter case perhaps implies that even the donee’s assigns could claim an implied warranty, if the charter mentioned his assigns; *sed qu.*

⁶⁰ *E.g.*, B. N. B. (1235—1236), pl. 1162: the King not bound to warrant his grant of a market against one who complains that it is a nuisance to his market, since the King’s grant said ‘unless it be to the nuisance of neighbouring markets.’ See also Bract. f. 394 (if donor had only a life interest and did not purport to convey the fee, the warranty would end at his death); also note ⁶⁴, *post*.

⁶¹ 4 Ed. I, st. 3, c. 6.

⁶² Consequently, when *Quia Emptores* abolished subinfeudation in 1290, the word ‘*dedi*’ became powerless to bind the feoffor’s heirs to warranty. Thereafter clauses of express warranty thus became essential: 3 H. E. L. 160.

⁶³ The form of the statute itself perhaps implies this, at least as regards feoffments by subinfeudation: ‘it is agreed by the same [*i.e.*, by the King’s justices and others] that the donor and his heirs are bound to warranty.’

⁶⁴ Bract. f. 388b, § 1; *Judicium Essoniorum* (1267—1273), c. 8, Law Tracts, p. 137. Hengham, *Magna* (1272—1275), c. 13, pp. 45—46, says precisely the same, though written after the Statute of Bigamy.

by him.⁶⁵ The fact that the great Hengham, writing apparently after the Statute of Bigamy, repeats the above common law rule as to 'charters of simple donation'⁶⁶ appears to imply either (i) that only gifts by sub-infeudation are 'simple donations'—and that, as to these, the Statute of Bigamy had merely declared the existing law; or (ii) that he did not consider that this statute was intended to prevent the judges from continuing to construe the word '*dedi*' as it had been construed in the past—but aimed merely at providing a *prima facie* construction for the word.⁶⁷ It is not unlikely that a contemporary lawyer would have accepted both these propositions as to the scope of the statute. However this may be, the real value of the Statute of Bigamy here is that it threw some very necessary light upon the effect of '*dedi*' when used in a feoffment by way of substitution.⁶⁸ True, it did not say whether the warranties that *dedi* implied were to be available to the feoffee's heirs; but presumably the rule on this point was the same as that stated at the end of the preceding paragraph. No doubt the warranty by implication from words or phrases used in the feoffor's gift or charter was a boon to one who had no express clause of warranty upon which to rely. But it evidently lacked the advantages of certainty and elasticity that the express warranty clause could give.⁶⁹

A fourth kind of implied warranty was that which arose from an exchange (*escambium*) of lands. Here we must be careful to distinguish between two very different kinds of *escambium*. (i) First, there was the ordinary exchange made (as modern lawyers would say) by act of the parties—*e.g.*, when *A* conveyed Blackacre to *B* and his heirs in consideration of a conveyance of Whiteacre from *B* to *A* and his heirs. Here each party (and his heirs after him) was impliedly bound to warrant to the other party and his heirs the land he had thus given.⁷⁰ Moreover, in such a case, if *A*'s title to Blackacre was defective so that some stranger ultimately recovered it from *B* or his heirs, the latter had a special remedy against Whiteacre by way of compensation: they were entitled

⁶⁵ Bract. f. 388b, § 1. Bracton adds that otherwise there would be no implied warranty by the lord. Hengham, writing after the Statute of Bigamy, argues that the lord ought to warrant in such a case whether his charter said *dedi* or *confirmavi*: *op. cit.*, p. 46. In fact it usually said both.

⁶⁶ See note 64, *ante*; and cf. note 63, *ante*.

⁶⁷ This problem seems insoluble, for Bracton seldom distinguished a subinfeudation from a substitution. For him practically every conveyance was a 'donation'; but one gets the impression that he usually had in his mind conveyances by subinfeudation. The same can be said also of the reports and of other authors of this period. The solution may be that Hengham, *Magna*, was written earlier than is supposed, or that the great Hengham nodded.

⁶⁸ See notes 62, 67, *ante*.

⁶⁹ See Britton, 3, c. 11, § 22, for the rule that when the King was vouched to warranty on a charter which contained no warranty clause, the judgment was to be deferred so that he might consult his justices as to whether he was bound to warrant 'by virtue of some special words' therein. Note also that no warranty seems to have been implied (though it could be expressed) in an assignment of a wardship—B. N. B. (1226), pl. 1744; nor in a charter of Quitclaim—S. S. 59 (Eyre Rolls, 1221), pl. 170.

⁷⁰ B. N. B. (1231), pl. 633; *ibid.* (1238—1239), pl. 1268; Statute of Wales, 1284, cc. 7, 8.

to recover Whiteacre, into whosoever hands it might have come.⁷¹ Later lawyers will say that an exchange of lands carried an implied right of re-entry, as well as an implied warranty.⁷² (ii) There was a second variety of *escambium*, which occurred by operation of law. Every warranty of land imposed an obligation not only to defend actions brought against the donee or his successors in title, but further, in the event of a failure to defend such an action successfully, to give him other lands of equal value as compensation. The judgment of the Court in that action awarded both that the successful plaintiff recover the land for which he had sued the defendant and, further, that *escambium* be made to the defendant out of the lands of his warrantor. The sheriff would then take from *W*, the warrantor, lands to the value of the land lost and place *D*, the defendant, in possession of them.⁷³ Ordinarily this was the end of the matter. But it sometimes transpired that *W*'s title to the lands thus delivered as compensation to *D* was doubtful or defective; and *D* might therefore find himself defendant once again—this time in an action brought by one *Z*, claiming those lands from him. In this action, too, *W* will be bound to warrant *D*: the warranty (express or implied) which had bound *W* to warrant the original gift extended by implication to those lands which were exacted from him when that gift was lost.⁷⁴ When discussing such topics hereinafter, the word 'exchange' will be used to indicate a normal exchange of lands; the terms '*escambium*' or 'compensation to the value' will be used to indicate lands exacted from a warrantor for failing to implement his warranty.⁷⁵

The fifth and final case, in which a duty to warrant arose by implication, concerns the widow's *dower*. This warranty, which was abnormal in several respects, was perhaps the most frequent of all in thirteenth century litigation. The heir of her deceased husband was, by law, the warrantor of her dower.⁷⁶ If, therefore, a widow enjoying dower out of certain land was impleaded for that land, she would vouch the heir to warranty.⁷⁷ But there was, in dower, another aspect of the matter.

⁷¹ But, pending the recovery of that land, the warrantor or his heir must provide other compensation which will be returnable: B. N. B. (1231), pl. 633.

⁷² See, e.g., the judgment in *Bustard's Case* (1603), 4 Co. Rep. 121; also Co. Litt. 384b; 2 Blackst. Comm. 323.

⁷³ § 5, *post*.
⁷⁴ Y. B. 22 Ed. I (1294), R. S. 398; Hengham, *Magna*, c. 13, p. 49. This was a useful rule, for when the lands were exacted from *W* as compensation, he did not ordinarily make any charter in which he might warrant them. *D*, however, would be likely still to have the charter of the original gift whereby *W* or his ancestors had warranted that gift. That a donee and his heirs had the right to have possession of the charter of their gift, see Bract. f. 33b.

⁷⁵ The ambiguity of the word *escambium*, in the writings and records of this century, is a difficulty in this subject.

⁷⁶ Bract. ff. 98, 325b, § 5. See also *Fet Asaver* (before 1267), Law Tracts, 74: to the general rule that one cannot vouch an infant without producing a charter, some MSS. add: 'not so in dower, for in dower the woman has by nature a charter.'

⁷⁷ When the husband (e.g., a bastard) leaves no heir, his lord taking by escheat must act as warrantor of her dower: Bract. ff. 297b, 299. It seems also that any feoffee to whom the husband had conveyed land in his lifetime was in some senses warrantor of her dower—so far as that land was concerned: Bract. ff. 298, 299; Britton, 5, c. 10, § 12.

If a widow brought an action, claiming dower out of lands in the possession of another, the defendant could refuse to answer her unless and until her warrantor was present in court.⁷⁸ This peculiar rule sometimes placed a widow in grave difficulty and seriously delayed her action.⁷⁹ It was highly convenient, however, from the standpoint of the defendant; for he was almost invariably her deceased husband's feoffee. As such, he had usually a right to vouch the heir to warrant and defend him. Evidently, therefore, the rule that he need not answer the plaintiff until she produces the heir in court⁸⁰ protected him against one of the most serious disadvantages of the general law of warranty—namely that although it was easy enough to vouch a warrantor, it was often very difficult to get him into court.⁸¹

§ 3.—THE OPERATION AND SCOPE OF A WARRANTY

Having considered the circumstances in which the obligation of warranty arose, it is now necessary to consider how and to what extent this obligation could be enforced.

A warranty is primarily a duty to defend in his seisin a tenant who has vouched one to warrant him. Bracton said that it is this and nothing else.⁸² But he well knew, as we have already seen, that a breach of this primary obligation raised a secondary obligation—an obligation to make *escambium* for the lands lost.⁸³ There were thus two possible advantages in vouching a warrantor instead of defending an action oneself. First, the warrantor may be able to raise some 'exception' (i.e., defence) which one could not raise oneself—e.g., that something was done between the warrantor and the plaintiff ('demandant'), or between their ancestors, that precludes the plaintiff from claiming the land from him. Perhaps a fine had been levied between them. Or perhaps, in time past, the plaintiff or his ancestor had conveyed that very land to the warrantor or his ancestor by a conveyance which included a warranty (express or

⁷⁸ Bract. ff. 297, 297b. Incidentally, this enabled a defendant, who was lord of the fee and so entitled (subject to her dower) to hold the inheritance and the person of the heir during the latter's infancy, to force the widow to produce an infant heir whom she was hiding from him: *ibid.*

⁷⁹ Thus if the heir be absent on a crusade, her plea must await his return: Bract. f. 298. If she name the wrong person as her heir and warrantor, she will lose her action: accordingly she is sometimes compelled to submit to an adjournment whilst, by due process of law, the true heir is found from a number of candidates. But the Court had power, should her plea ultimately succeed, to award her damages in compensation for the period of exclusion that had elapsed since her husband died: Provisions of Merton, 20 H. III, c. 1; Britton, 5, c. 3, § 2.

⁸⁰ If the widow could not herself produce the heir, the Court would issue a writ to the sheriff to summon him: Bract. f. 298, § 3. The same applied where a defendant was unable to produce his warrantor.

⁸¹ As to warranty in dower, see further note ¹⁵⁴, *post*. As to the difficulty when a defendant's warrantor would not come, see § 4, *post*.

⁸² Bract. f. 280b, § 2: 'To warrant is nothing else than to defend and acquit in his seisin a tenant who has vouched a warrantor, nor anything else except the defence of the thing claimed.' If he defends the tenant successfully, the latter will, of course, remain in seisin: Bract. f. 394b.

⁸³ That the obligation to compensate was only a secondary obligation, see 1 P. and M. 286.

implied), so that the plaintiff is bound to warrant that land to the warrantor and is accordingly barred from suing him for it.⁸⁴ The reason, be it noted, why the plaintiff lost if the warrantor thus produced a perfect defence was that, once the latter had come into court and had warranted there, the plaintiff's action was now an action against him, and the original defendant was defendant no longer.⁸⁵

Sometimes, of course, a tenant may think that he himself has a perfect defence against the demandant. In that case he will probably decide to defend the action himself, and so will not vouch his warrantor to defend it for him.⁸⁶ But here he runs a grave risk. If his defence fails, he has no right to any *escambium* from his warrantor; for the latter may justly say that, since he was given no opportunity of defending the action, he has committed no breach of his warranty-obligation.⁸⁷ This leads us to a second advantage of vouching a warrantor: if one fails to vouch him one thereby forfeits any chance of obtaining *escambium* in case the demandant's action succeeds. If one is aware, however, that one's warrantor has no land from which *escambium* can be taken, this aspect of the matter is naturally of no importance. Finally, there were some actions in which the law did not permit a defendant to vouch his warrantor—e.g., in novel disseisin. More will be said of this hereafter.⁸⁸ Meanwhile it is noteworthy that even in such a case the defendant was not entirely unprotected. The writ *de Warrantia Cartae* was available to him; and, by bringing a separate action founded upon this writ, he could recover *escambium* from him who was bound to warranty, in case his land was lost by judgment or by verdict of the assize.⁸⁹

The scope of the obligation to warrant was not as wide during this period as one might suppose. First, the *escambium* which it brought,

⁸⁴ Bract. f. 379b, § 4. See also B. N. B. (1225), pl. 1054 (quitclaim as a bar); *Fet Asaver*, Law Tracts, 82—83 (homage and service as a bar); *Judicium Essoniorum*, c. 8, Law Tracts, 138 (fine as a bar: '*satis est notorium*').

⁸⁵ Glanv. 13, c. 38; also § 4, *post*. A natural assumption would be that the action failed because, on proof that the plaintiff had conveyed all his right in the land to *W*, who had then conveyed it to the defendant, it would follow that the plaintiff has no claim against the defendant. But this process of reasoning is not of the thirteenth century. The plaintiff failed because (i) by coming into Court as warrantor, *W* himself became defendant, (ii) the warranty (express or implied) that the plaintiff had given when he conveyed the land to *W* prevents him from suing *W*. That warranty would not have prevented him from succeeding against the original defendant unless it had expressly extended to *W*'s assigns: see also § 7, *post*.

⁸⁶ Bract. f. 261b; Hengham, *Magna*, c. 13, 40—41. See also *Exceptiones ad Cassandum Brevia*, Law Tracts, 177—178 (receipt of homage as a bar); S. S. 53 (Eyre Rolls, 1219), pl. 371 (feoffment as a bar).

⁸⁷ Glanv. 3, c. 5; Bract. ff. 379b, 380; Fitzherbert, *Natura Brevium*, 134 I; B. N. B. (1222), pl. 1559; Y. B. 20 Ed. I (1292), R. S. 176—180. Moreover, it was at least arguable that a failure to vouch discharged the warranty for ever, though, if in a mere possessory action, only so far as concerned the warranting of possession (as opposed to right): Y. B. 20 Ed. I (1292), R. S. 176—180. See also Britton, 3, c. 9, §§ 15, 17.

⁸⁸ See p. 289, *post*; also note 125, *post*.

⁸⁹ Bract. ff. 175b—176 (disseisor's feoffee had no need to sue *de warrantia cartae* unless he was enfeoffed immediately after the alleged disseisin); Y. B. 20 Ed. I (1292), R. S. 176—180. In Glanvill's day the position was rather different: Glanv. 13, c. 38. See also *post*, note 125, for other cases in which voucher was disallowed.

if the warranted land was lost as a result of a successful action, was obtainable only from the warrantor's *land* (not from his personal property), and, in the case of an heir warranting the conveyance of his ancestor, only from land which he had inherited from that ancestor.⁹⁰ Secondly, there was at this period no duty to warrant a conveyance (whether one's own or one's ancestor's) if that conveyance was defective⁹¹—e.g., a conveyance by feoffment without livery of seisin or by quitclaim (i.e., release) to one who was not already seised.⁹² Even an express warranty in a charter recording such a conveyance was useless.⁹³ It was equally an objection to the warranty that the original feoffee, though seised, had obtained his seisin otherwise than by virtue of the feoffment on which the warranty was given.⁹⁴ But the fact that the original donor had no title or a defective title when he made the conveyance did not impair the warranty that he had given, so long as he was in fact seised at the time he conveyed the land.⁹⁵ Thirdly, a warranty could not be enforced by anyone who had already lost his seisin;⁹⁶ it was therefore imperative that a person likely to be disseised (whether by action or otherwise) should vouch or sue his warrantor before being ejected from the land.⁹⁷

On the other hand, there were some well-established limits upon the duty to warrant which have their counterparts in the modern law as to covenants for title. (i) A warranty did not avail against incumbrances created by the donee himself or by his successors in title: it operated only against adverse claims that had existed before the warranty and conveyance were made.⁹⁸ (ii) There was evidently a presumption

⁹⁰ Glanv. 3, c. 1. See further, § 5, *post*.

⁹¹ S. S. 56 (Eyre Rolls, 1218—1219), pl. 1147 (sergeanty conveyed without royal licence); B. N. B. (1225), pl. 1665 (same); B. N. B. (1223), pl. 1648 (donor a leper); B. N. B. (1224), pl. 1000 (*non est factum*); B. N. B. (1223), pl. 1659 (same); B. N. B. (1227), pl. 1881 (confirmation by married woman).

⁹² B. N. B. (1231), pl. 495 (gift); Y. B. 21 Ed. I (1293), R. S. 196—204 (quitclaim); Y. B. 22 Ed. I (1294), R. S. 316—320 (same). At first this rule applied even to a conveyance made by fine; but this was altered by the Statute de *Finibus Levatis* (1299), 27 Ed. I, see 2 P. and M. 104; and it had been doubted by Bereford J. as early as 1293: Y. B. 21 Ed. I, R. S., at p. 60. Although a release or quitclaim (and any warranty it gave) was invalid at this period unless made by a person who already had a right in the land (Britton, 2, c. 8, § 9), this rule was changed early in the next century (Plucknett, *Concise History, etc.*, ed. 3, 552), whereupon a great extension in the use of warranty as a bar became possible.

⁹³ Mirror of Justices, S. S. 7, 74—75; B. N. B. (1220), pl. 116; B. N. B. (1222), pl. 199 (confirmation by the King). Similarly, it was a good objection to an alleged warranty that the donor himself was never so seised that he could validly give: B. N. B. (1224), pl. 966; B. N. B. (1222), pl. 199. These rules caused special difficulty in conveyances of advowsons, where a seisin by presenting was so seldom possible: Bract. ff. 54, 54b (warranty invalid because donor never seised); Britton, 4, c. 4, § 4 (same if donee never seised).

⁹⁴ B. N. B. (1230), pl. 399; B. N. B. (1223), pl. 1648; B. N. B. (1227), pl. 1835.

⁹⁵ Bract. f. 13b; S. S. 59 (Eyre Rolls, 1221), pl. 1134 (husband conveys wife's property with warranty).

⁹⁶ Bract. ff. 37b, 242b, 243; Britton, 4, c. 4, § 4; Fleta, 3, c. 14, §§ 10, 11; B. N. B. (1222), pl. 1559.

⁹⁷ This is presumably a reason why the action *de warrantia cartae* was sometime brought in advance: e.g., S. S. 53 (Eyre Rolls, 1219), pl. 666; *ibid.* pl. 759.

⁹⁸ Bract. f. 391: A feoffor is only bound to warrant "against persons who had right in the thing given before his feoffment." See also Britton, 3, c. 11, § 25; Fleta, 5, c. 4, § 16; S. S. 59 (Eyre Rolls, 1222), pl. 1471; B. N. B. (1231), pl. 600. If a person,

that neither a conveyance nor the warranty that accompanied it was intended to give or guarantee to the donee and his successor in title anything greater than the donor himself possessed when he made the conveyance. Sometimes, of course, the donor purported to convey the land to his donee more freely than he himself had held it—*e.g.*, a gift by subinfeudation in frankalmoign or in frank-marriage. In such a case he was bound, as we have seen, to uphold this freedom by acquitting the donee and his successors against the services due to the superior lords of the fee.⁹⁹ But ordinarily the donor's gift was or was construed to be '*sicut ipse illud tenuit*.' Hence, the warranty of a donor who, at the time of the gift, was seised only in service and not in demesne, did not ordinarily bind him and his heirs to warrant the land in demesne.¹⁰⁰ Difficult cases sometimes arose, of course, as to the precise limits of this rule.¹⁰¹ Similar difficulties have arisen in modern conveyancing law.¹⁰²

§ 4.—VOUCHING TO WARRANTY

Before considering in further detail the manner and effect of vouching a warrantor it is desirable, perhaps, to attempt a rough sketch of the action for land in the thirteenth century. The plaintiff ('demandant'), by one of the available writs, commences his action against whoever happens to be in possession ('tenant'), alleging that he or some ancestor of his formerly held that land and that accordingly he ought to have it now. He may offer to prove his alleged right by battle if the action is proprietary, or by the country (*i.e.*, a jury) if it is semi-proprietary; and if it is a possessory action, the assize is already waiting outside the Court (or ought to be), ready to give its answer on the point. The tenant (defendant) will aim either at producing some good 'exception' (*i.e.*, defence) or at vouching a warrantor who can do so. And we may be sure that the tenant (or even the warrantor), especially if he feels that he has no effective exception to raise and fears the verdict of the jury

vouched to warranty, took care to counterplead as above, and was nevertheless unlawfully compelled by the Court to make *escambium*, that *escambium* was recoverable by bringing an action *quare cepit escambium*: Bract. f. 391b; B. N. B. (1231), pl. 512; *ibid.* pl. 612 (s.c.).

⁹⁹ See *ante*, pp. 280—281.

¹⁰⁰ In such a case, therefore, if the donee or his successor in title was sued by one claiming in demesne and thereupon vouched the donor or his heir to warrant, the demandant or the vouchee could counterplead the voucher: B. N. B. (1222), pl. 164; also Bracton's annotation to this plea to the effect that one cannot vouch in demesne except for a gift in demesne, nor in service except for a gift in service. See also B. N. B. (1234), pl. 836; B. N. B. (1226), pl. 1717.

¹⁰¹ *E.g.*, B. N. B. (1227), pl. 1900. Here the donee sought to compel the donor to warrant and acquit him against the local parson, who was demanding from the donee 6s. *p.a.* The donor alleged, by way of defence, that before making the gift he had attorned two of the tenants of the property (whose rents together amounted to 6s. *p.a.*) to this same parson, and that when he gave the property to the donee he gave it '*in eodem statu quo terram illam tenuit*.' The jurors found, however, that no such attornment had ever occurred: on the contrary, the donor had himself paid the parson this 6s. every year. *Held*, therefore, the donor must warrant and acquit his donee against the parson's claim.

¹⁰² *E.g.*, as to what amounts to an 'incumbrance' within the meaning of (i) the modern implied covenants for title, (ii) the modern rule that a vendor must disclose latent defects: see Dart, *Vendors and Purchasers* (8th ed.), 109 *et seq.*, 666 *et seq.*

or assize, will use every available artifice by which to delay the procedure as long as possible; for the longer judgment is delayed the longer will he retain the land (or defer his liability to make *escambium*). If a good exception can be raised for the defence, and is either admitted by the demandant or duly proved by tenant or warrantor to the satisfaction of the court (*e.g.*, by oath-helpers or jury or by comparison of seals), the demandant's claim fails and the case is over. On the other hand, if the defence relies upon an exception and fails to substantiate it, judgment will usually follow for the demandant at once.¹⁰³

'Voucher to warranty is nothing more than saying "such an one ought to answer for me."'¹⁰⁴ But to vouch was not in practice as simple as it sounds. A 'vouchee' (a person vouched to warranty in court) could not always be relied upon to come to court and, by undertaking the defence of the action, become one's 'warrantor.' There is much authority, in text-books and cases of the period, about the procedure for getting him to court and about the number of defaults in appearance and other delays that are allowed to him. But there is also the preliminary question whether one is prevented by some rule of law from vouching such a person as he. Even if there be such a rule, it may not be of universal application;¹⁰⁵ and sometimes it is not altogether certain whether the alleged rule exists.¹⁰⁶ One may even vouch the King to warranty, though one should do so with due tact and diffidence, since there is no method of compelling him to warrant.¹⁰⁷ And one may vouch even a person under age—as to which more will be said hereafter.¹⁰⁸ As for the personality of the *voucher*, it seems that even a mere lessee (at will or from year to year or for a term), unable himself to bring a real action, when sued in such an action can vouch his lessor or the lessor's heir.¹⁰⁹ Indeed, no one as a rule was prohibited from vouching a

¹⁰³ This was not the case, I think, with a mere exception to the writ; nor even with a more fundamental exception, so long as it was withdrawn in time.

¹⁰⁴ Y. B. 21 Ed. I (1293), R. S. 468, *per* Berewyke J.

¹⁰⁵ *E.g.*, sometimes even a *plaintiff* may vouch, as though defendant: Stat. Westm. II, 13 Ed. I, c. 4 (action to recover land lost by reversioner's default). Sometimes one can even vouch oneself: Y. B. 21 Ed. I (1293), R. S. 14—16 (donee vouches himself as heir of donor); also note ¹¹⁶, *post*.

¹⁰⁶ Can a husband vouch his wife, when sued by a stranger for land that he holds in her right? This was clearly permissible in 1202 (S. S. 3, pl. 233) and in 1221 (S. S. 59, pls. 129, 172, 219, 220, 714). Bracton, f. 381, § 7, is of opinion that he can if she is not named in the writ, but 'according to some the writ should abate'; and it seems that this latter view ultimately prevailed, since the two ought to be sued as co-defendants. As to wives vouching their husbands, see Bract. f. 381, § 7; Y. B. 20 Ed. I (1292), R. S. 338.

¹⁰⁷ See p. 292, *post*. His liability to warrant was usually determined by the King in Council. See B. N. B. (1234—1235), pl. 1108, where the King himself seemed to declare the law on the point, viz., he is not compellable to warrant, since no one vouched need answer without the King's writ, and the King has no superior within his realm: he then admitted liability, and *escambium* was awarded against him.

¹⁰⁸ See notes ¹²⁰, ¹³², *post*; also the final paragraph of this section.

¹⁰⁹ Bract. ff. 168, 385 ('though reason suggest the contrary'); S. S. 3 (1202), pl. 232 (tenant 'from year to year at pleasure'); B. N. B. (1231), pl. 658; Y. B. 22 Ed. I (1294), R. S. 446. The assignee of a wardship may vouch his assignor when another claims the wardship from him: Bract. f. 91b. But, when a real action is brought against him by a widow claiming her dower, as a rule he cannot do so (possibly because the gift of a wardship would not ordinarily imply any guarantee against dower): see B. N. B. pls. 712, 1700 (*s.c.*), 714, 1744; also Statute of Bigamy, 1276, c. 3 (King's assignee cannot vouch him).

warrantor if he had one.¹¹⁰ To this rule, however, there was an important exception. In an assize of novel disseisin, the alleged disseisor was not allowed to vouch anyone;¹¹¹ and even his innocent feoffee (who, of course, should be co-defendant with him¹¹²) could not 'vouch' a warrantor either, though his feoffor (who was ordinarily the disseisor and so co-defendant with him) could warrant him *gratis*.¹¹³ This restriction upon warranties in novel disseisin seems to have been due, in part, to an anxiety to avoid in this action the delays which normally ensued if one vouched a warrantor who was not present or was unwilling to warrant.¹¹⁴ And there is authority that a similar restriction applied to actions founded upon the writ of entry *sur disseisin*,¹¹⁵ though it seems that there were some circumstances in which a voucher was permissible in this case.¹¹⁶ There was no doubt, however, that defendants in other varieties of pleas of entry could vouch (save that 'the degrees' affected the matter¹¹⁷); and the same may be said in general as to all other actions for the recovery of a freeholder's land.¹¹⁸

Let us now assume that a defendant has vouched a warrantor in an action wherein this is permissible, and that there will be no difficulty in persuading the vouchee to come to court. Even here the voucher may fail. For the demandant, or more frequently the vouchee himself, may raise in court some legal objection to (*i.e.*, may 'counterplead') the

¹¹⁰ Bract. f. 380b, § 3.

¹¹¹ Glanv. 13, c. 38; Bract. f. 380b, § 4; Mirror of Justices, S. S. 7, 91 (instead, 'avertments by records or by muniments and evidence are available'). A like rule was applied to actions founded upon the Dictum of Kenilworth, whereby rebels who had forfeited their lands were pardoned and enabled to recover them—*e.g.*, from 'the King's assignees: S. S. 57 (K. B. 1290), pl. 5.

¹¹² Bract. f. 175b. The feoffee is himself regarded as a disseisor if his feoffment occurred immediately after the disseisin: *ibid*.

¹¹³ S. S. 53 (Eyre Rolls, 1219), pl. 371. See also Bract. ff. 175b, 177b, that this would secure to him his *escambium*, as also would a finding by the assize that he was the disseisor's feoffee; Britton, 2, c. 22, § 7. See also Y. B. 20 Ed. I (1292), R. S. 2—4, and the Latin *addendum* thereto.

¹¹⁴ See also 2 P. and M. 659, n. 2, that despite Glanvill's doubt whether voucher could be allowed in any of the possessory actions, voucher in mortdancestor soon became very common.

¹¹⁵ Fitzherbert, *Natura Brevium*, 134 D. ('writ of entry in the nature of an assize').

¹¹⁶ In none of the eleven pleas of entry *sur disseisin* indexed by Maitland in Bracton's Note Book did the defendant vouch to warranty: most of these were against the heir of a disseisor who had died pending an assize of novel disseisin. In one case the defendant answered that he derived his title not through the alleged disseisor but from X, and he proffered X's charter of gift but did not vouch him: B. N. B. (1235—1236), pl. 1133. Compare a curious case where the deceased disseisor had enfeoffed his infant heir who, on being sued, vouched himself (as heir of his donor) presumably in order to achieve delay, and was apparently permitted to do so: Y. B. 21 Ed. I (1293), R. S. 234—236.

¹¹⁷ In a writ of entry that makes mention of 'degrees,' one cannot vouch anyone not mentioned in the writ (*i.e.*, cannot 'vouch out of the line') unless one first traverse the entry alleged—a rule inapplicable, of course, to writs of entry in the *post*: Bract. ff. 219b, 320b, 321; *Fet Asaver*, Law Tracts, 66—68; Stat. Westm. I, 1275, c. 40; Britton, 5, c. 15, § 1. Apparently the same rule applied to the analogous writ of *Aiel*: Y. B. 20 Ed. I (1292), R. S. 298. Instead of merely traversing the alleged entry and vouching a warrantor, one could except against the writ: S. S. 56 (Eyre Rolls, 1218—1219), pl. 154.

¹¹⁸ Unusual instances include B. N. B. (1228), pl. 296 (voucher in *de fine facto*); S. S. 57 (1290, K. B.), pl. 19 (voucher in action begun by a special writ of the Chancery witnessed by the King). Apparently one could not vouch in a *darrein presentment*: Britton, 4, c. 3, § 1; nor in a *nuper obiit* unless one claimed by feoffment: *Fet Asaver*, Law Tracts, 95.

voucher.¹¹⁹ In order that he may be on sure ground when raising such a counterplea, the first thing that a vouchee should do, when he comes in answer to the voucher, is to ask on what grounds he has been vouched. The voucher will then have to show him the charter (if any) upon which he bases his claim that the vouchee ought to warrant him.¹²⁰ Meanwhile, of course, the principal plea is suspended until the vouchee's counterplea has been decided.¹²¹ And should the counterplea succeed, or the vouchee refuse to warrant (whether by failing to come to Court or by making default after he has warranted), the voucher is undefended¹²² and is not allowed to raise any defences of his own:¹²³ the principal plea is therefore at an end. If, however, the vouchee duly warrants in court, he becomes the defendant to the action and his voucher may go home.¹²⁴ The vouchee—now the 'warrantor'—can now do almost anything that an original defendant can do: he may either himself defend the action, raising what exceptions he can, or he may vouch a warrantor of his own.¹²⁵

¹¹⁹ A note in Y. B. 22 Ed. I (1294), R. S. 564—566, states that whereas the demandant can only counterplead the voucher itself ('Vouch you cannot, because,' etc.), the vouchee can only counterplead (i) the form of the voucher, and (ii) the alleged duty to warrant. Examples of (i) are that vouchee has co-parceners who ought to be vouched with him (*Fet Asaver*, Law Tracts, 97); and that the voucher had vouched at large, thereby implying that he claimed to be warranted in fee simple, whereas his gift was only a life interest or fee tail: Y. BB. 21 Ed. I (1293), R. S. 134; 22 Ed. I (1294), R. S. 570—576. Examples of (ii) include the objection that the vouchee himself has a right to sue for that land: Y. BB. 20 Ed. I (1292), R. S. 18—20; 21 Ed. I (1293), R. S. 8. After warranting in Court, it is too late to counterplead the voucher: Y. B. 20 Ed. I (1292), R. S. 30—32, *per* Cave J.

¹²⁰ Bract. ff. 381b, 389. The vouchee may then deny the validity of this charter on various grounds (*e.g.*, forgery, disability, duress or fraud): *ibid.* ff. 389b—390, 396—398b. If one desired to vouch an infant, one had first to show the charter to the clerk of the Court, before he would issue the necessary writ to summon the infant vouchee: *Fet Asaver*, Law Tracts, 74.

¹²¹ Bract. f. 389. But if the counterplea involved some very difficult point, delay could be avoided by postponing a decision on the counterplea and hearing the verdict of the assize at once: Bract. f. 261; S. S. 56 (Eyre Rolls, 1218—1219), pl. 27.

¹²² In *Mordancesthor* this would mean that the verdict of the assize would be heard at once: Bract. ff. 260b, 261; Britton, 3, c. 11, §§ 4, 7—9, 11, 16; B. N. B. (1233), pl. 734; B. N. B. (1222), pl. 196 (also S. S. 59, pl. 1468, *s.c.*); S. S. 59 (Eyre Rolls, 1222), pl. 1471. In a Writ of Right, however, judgment would be given at once for the plaintiff: Bract. ff. 260b, 261; B. N. B. (1231), pl. 600; B. N. B. (1224), pl. 945; B. N. B. (1226), pl. 1717. So also in pleas of dower: *e.g.*, B. N. B. pls. 284, 558, 560, 573, 714, 748, 836; S. S. 2 (Manorial Courts, 1288), 110. See also Stat. Westm. 11, 1285, c. 6, reciting that when a vouchee successfully counterpleads the warranty the tenant who vouched him 'loses the tenement demanded,' and enacting that henceforth a vouchee who, after counterpleading unsuccessfully, is held liable to warrant shall likewise lose the tenement to the plaintiff.

¹²³ Y. BB. 21 Ed. I (1293), R. S. 262—266 (scribe's note); *ibid.* 440; *ibid.* 468 ('you cannot vouch to warranty and answer as well'); 22 Ed. I (1294), R. S. 470—472, *per* Hertford J. *Aliter*, if he withdraw the voucher before the vouchee has actually warranted in Court: Y. B. 21 Ed. I (1293), R. S. 272.

¹²⁴ Glanv. 3, c. 1; Bract. ff. 260, 260b, 380b, § 2, 387b; Hengham, *Magna*, c. 13, p. 44; *Fet Asaver*, Law Tracts, 82; Britton, 3, c. 11, §§ 18, 21; *ibid.* 5, c. 5, § 1; S. S. 57 (1292, K. B.), pl. 42—'tenant by his warranty.'

¹²⁵ Bract. ff. 260—260b, 387b. See also Britton, 3, c. 11, §§ 7—9, 11, 15, 17. At one time, this process of warranting and 'vouching over' could be repeated *ad infinitum* (Bract. ff. 260, 260b); but it was checked by Stat. Westm. I, 1275, c. 40, so that in future one could not safely vouch anyone who or whose ancestors had not been seised since the date of the seisin on which the plaintiff rested his claim; for henceforth the Courts must allow a demandant to counterplead such a voucher—unless (a reservation repealed by 20 Ed. I., st. 1) the vouchee was already in Court and willing to warrant at once. This enactment was directed against false vouching for purposes of delay. But it expressly preserved the right to enforce one's warranty by an action *de warrantia cartae* in every such case.

Of the few things that he cannot do,¹²⁶ the most emphasized is that he cannot, after warranting, demand a view of the land that the plaintiff is claiming.¹²⁷ Only the original defendant can have the view; and, if he is wise, he will take care to have it before he vouches anybody. For, if his vouchee comes and shows that the land which the plaintiff is claiming is not that which he is bound to warrant, the voucher fails; and accordingly the defendant has now neither a warrantor nor the right to say anything in his own defence.¹²⁸

Evidently, therefore, from the standpoint of the defendant in an action for the recovery of land, whereas to vouch a warrantor successfully might be highly advantageous, to vouch one unsuccessfully was likely to be fatal.¹²⁹ There was also, of course, a grave risk that even a vouchee who came and warranted willingly might have nothing to lose (having no assets wherefrom to make *escambium*), and so might cheerfully allow the action to go against him, without bothering either to raise any 'exception' himself or to vouch some warrantor of his own.¹³⁰ From the standpoint of the plaintiff, on the other hand, the one great objection to the process of voucher to warranty was that, whether the vouchee warranted or not, the process of voucher delayed him in his action. Such a delay, besides hindering the plea and so postponing the plaintiff's recovery and enjoyment of his land, might even frustrate his action altogether; for some decisive event might intervene, such as the death of one of the parties, whereupon his only remedy would be to purchase a new writ and begin all over again. In the hands of an unscrupulous lawyer this process, cunningly combined with the procedural rules which permitted a certain number of essoins and defaults of appearance to defendants and vouchees, might secure untold delay.¹³¹ Another favourite dilatory device was

¹²⁶ *Semble*, he cannot challenge the validity of the writ: Y. B. 20 Ed. I (1292), R. S. 44—46; yet in Y. B. 21 Ed. I (1293), R. S. 468, Berewyke J. seems to argue the contrary. And, of course, after warranting, he cannot now counterplead the voucher: *ante*, note ¹¹⁹.

¹²⁷ The mysterious justification given for this rule is that a vouchee ought to know what land he is bound to warrant: Bract. ff. 377b, 389, 394b; Hengham, *Magna*, c. 10, p. 36; *Judicium Essoniorum*, Law Tracts, 131—132. See also Hengham, *Parva*, c. 4, p. 58; B. N. B. (1231), pl. 534; and S. S. 56 (1218—1219), pl. 299 (appeal from Shire Court, which had allowed the view). In S. S. 53 (1219), pl. 666, a view was allowed in an action *de warrantia cartae*, and Bracton put a mark against the roll.

¹²⁸ *Fet Asaver*, Law Tracts, 66—68, 72; Hengham, *Magna*, c. 10, pp. 36—37. Each gives an anonymous case (probably identical) wherein the plaintiff claimed one-half of the defendant's land, and defendant vouched a warrantor who was only bound to warrant the other half.

¹²⁹ The risk is even greater if one is vouching one's lord, on grounds of homage and service, without a charter of warranty: here one should vouch discreetly, having first made certain that he will admit the warranty or homage or that he has previously acknowledged it in Court: *Judicium Essoniorum*, c. 8, Law Tracts, 138.

¹³⁰ *E.g.*, B. N. B. (1222), pl. 144—vouchee comes and warrants, but raises no exception. See also *Fet Asaver*, Law Tracts, 72, as to the vouchee unwilling to vouch over.

¹³¹ See Y. B. 21 Ed. I (1293), R. S. 288—290, showing how a pleader, acting both for the defendants and for the vouchee, thus prolonged an action of entry *cui in vita*. See also 2 P. and M. 660, for Maitland's theory that the reason why the main plea was thus delayed pending questions as to warranting was that the action for land was originally a punitive action, seeking primarily to find and punish the real wrongdoer. A warrantor or other defendant who loses to the plaintiff is amerced: *e.g.*, B. N. B. (1222), pl. 144; S. S. 2 (Manorial Pleas, 1249), p. 19.

to vouch an infant, so that the main plea might be adjourned until his coming of age.¹³² Yet another was to vouch the King, so that the action might be stayed pending the King's decision whether he would warrant or not.¹³³ And although these abuses were eventually remedied, in part, by ordinance or by statute,¹³⁴ they did not entirely disappear. The fact that they survived is probably one of the major reasons why the actions in which they might occur—the real actions—were doomed ultimately to die.

§ 5.—*ESCAMBIUM*

We have observed already that a warrantor, who failed in his duty to warrant and defend the tenant in his seisin, was required by law to give him other land, of equal value, by way of *escambium* (compensation) for the land lost. We have seen also that, in cases where a vouchee came to court and warranted but did not succeed in overthrowing the plaintiff's claim, the very judgment that awarded the land to the successful plaintiff directed also that *escambium* be made to the defendant out of the lands of the warrantor.¹³⁵ Similarly, where a defendant vouched *A*, who warranted and vouched *B*, who warranted and vouched *C*, who warranted and lost the land to the plaintiff: here the judgment would order that *C*'s land (to the value of that lost) be delivered as *escambium* to *B*; that *B*'s land make similar *escambium* to *A*; and *A*'s land to the original defendant. In practice, however, it seems that the *escambium* (if any) obtainable from *C*'s land passed, through *B* and *A*, to the defendant direct.¹³⁶ There were rules, moreover, as to how the lands lost by the defendant should be valued for this purpose.¹³⁷ There were also rules of priority, in case a warrantor had not sufficient land wherewith to

¹³² Bract. f. 381b, § 2. This was the reason for the rule stated *ante*, note 120; *ibid*.

¹³³ A nice example is B. N. B. (1217), pl. 1306, where defendant vouched the infant King and prayed his age—so seeking to secure a two-fold delay. His voucher was disallowed because, when questioned, he had to admit that he could not give any good reason why the King ought to warrant him. See also note 107, *ante*.

¹³⁴ Delay by vouching the King was reduced by the so-called Statute of Hayles, 1251 (Bract. ff. 382b, 389b; also Twiss, Introduction to Bracton, R. S. VI, xiii—xx), and by the Statute of Bigamy, 1276, cc. 1—3. Dilatory vouchers in general were reduced by Stat. Westm. I, 1275, c. 40; and, more specifically, by 20 Ed. I, 1291—1292, stat. 1. As to these, see *ante*, note 125; also Mirror of Justices, S. S. 7, 191. They were specifically attacked also by Stat. Westm. II, 1285, c. 6 (as to which, see *ante*, note 122).

¹³⁵ See the penultimate paragraph of § 2, *ante*; also Bract. f. 37b; B. N. B. (1222), pl. 144. This rule applied whether the duty to warrant arose expressly or by implication—*e.g.*, from a gift for homage and service. See Bract. f. 80b, to the effect that a lord, if he could, would willingly waive his seignory in order thereby to escape the liability to warrant or make *escambium*. By law, however, such a waiver did not have that effect, *ibid*. ff. 81b, 82b; but it seems that an assignment of the seignory in the King's Court, by a fine and a compulsory attornment of the tenant, did so: *ibid*.; also Britton, 3, c. 4, §§ 33, 36. See also notes 48, *ante*, and 126, *post*.

¹³⁶ Bract. ff. 260b, 387b—388; Hengham, *Magna*, c. 13, p. 43 (where it seems that the word *primus* should in fact read *postremus*); Britton, 3, c. 9, § 19. As regards the process of execution for *escambium*, by *Cape ad Valentiam*, see Bract, ff. 258—259, 387b; Y. B. 20 Ed. I (1292), R. S. 24; also B. N. B. (1222), pl. 96 (*writ de habendo escambium*).

¹³⁷ Bract. ff. 394b, 395: *e.g.*, the *escambium* covers only the lands lost by the judgment, although the warranty be larger; and it is estimated according to the state in which the lands were when they and the warranty were originally given, subsequent improvements being ignored.

make *escambium* to all of several dispossessed defendants.¹³⁸ And, of course, if the defendant had held in fee simple, the *escambium* delivered to him in compensation was likewise in fee simple.¹³⁹

The heir of one who had conveyed lands binding his heirs to warranty, was a less hopeful source of *escambium*. His liability to make *escambium* was restricted to lands that had come to him by inheritance from the ancestor who had made the conveyance with warranty.¹⁴⁰ Failing such assets by descent, no *escambium* was obtainable from the heir, provided that he took care when warranting in court to say something appropriate on the point.¹⁴¹ Bracton was clear that lack of assets by descent absolved the heir only from making *escambium*, not from the primary duty to warrant and defend the tenant.¹⁴² It seems from the cases, however, that this was not completely certain until the final decade of the thirteenth century.¹⁴³ In case an heir-warrantor, having as yet no (or insufficient) assets by descent, might subsequently obtain such assets, the customary judgment against him was that he make *escambium* out of any lands that he has *or may subsequently acquire* by inheritance from the deceased ancestor concerned.¹⁴⁴ Although, however, one might thus get *escambium* even from future assets by descent, one could ordinarily get nothing out of inherited lands that the heir had alienated before being vouched to warranty. A piteous appeal to the Court for its advice at the beginning of the century shows that, even in those early times, heirs were wont to alienate their inheritances for the purpose of evading possible claims for *escambium*.¹⁴⁵ Such an alienation, moreover, was perfectly effective in spite of its evasive purpose,¹⁴⁶ unless there were a collusive

¹³⁸ Bract. f. 388: e.g., if he had originally divided land into two plots and sold one plot to A and then the other to B, and both plots are subsequently lost in the same action, A's priority of feoffment carries priority of *escambium*.

¹³⁹ Hengham, *Magna*, c. 13, p. 49; cf. Y. B. 22 Ed. I (1294), R. S. 570—576 (a conveyance in tail). But see B. N. B. (1231), pls. 512, 612, as to the return of *escambium* exacted by a false judgment.

¹⁴⁰ Glanv. 3, c. 1; Bract. ff. 321b—322b, 394b—395. Thus he was not bound to warrant his father's conveyance out of lands inherited from his mother, *or vice versa*: Bract. ff. 322b, 394b—395. The rule applied to homage-warranty as to other warranties: Bract. f. 322b.

¹⁴¹ Bract. f. 383b; also Y. BB. 21 Ed. I (1293), R. S. 250; 22 Ed. I (1294), R. S. 536, and scribe's notes thereto.

¹⁴² Bract. ff. 322—322b.

¹⁴³ Y. B. 21 Ed. I (1293), R. S. 250, and scribe's note thereto. Earlier *dicta* as to the heir's position, failing assets by descent, seem to evade the point. This interpretation of the law became very important in later centuries, on the subject of warranty as a bar.

¹⁴⁴ Bract. ff. 388 (citing a case), 395; also scribe's note to Y. B. 21 Ed. I (1293), R. S. 250. Whatever little the heir had inherited was taken at once: B. N. B. (1224), pl. 944; *ibid.* (1225), pl. 1102, s.c. An example of assets to be subsequently acquired by inheritance from one's deceased mother is land which her surviving husband is holding by the curtesy: Bract. f. 383b. When such assets ultimately passed to the heir, he would be re-summoned by a judicial writ issuing out of the rolls of the justices: see the recital in c. 3 of the Statute of Gloucester, 1278; also Mettingham J., Y. B. 22 Ed. I (1294), R. S. 492—494.

¹⁴⁵ S. S. 3 (Select Civil Pleas, 165, 244, 255), at p. 102: a prioress vouches her donor's heir and 'craved the advice and help of the Court, for God's sake'; for the heir has carefully dispersed his inheritance among his brothers and sisters. See also Fitzherbert, *Natura Brevium*, 134 K, that land alienated by the heir before he is vouched is not liable for *escambium*.

¹⁴⁶ Y. B. 22 Ed. I (1294), R. S. 492—494. See also Y. B. 21 Ed. I (1293), R. S. 210, where counsel's opinion was taken (and very forcibly given) about an heir-vouchee who had alienated his inheritance *after* being vouched. The plaintiff, conspiring with the

bargain whereby the heir's alienee was to re-enfeoff him.¹⁴⁷ It seems, however, that any land that an heir had acquired *in exchange* for his inherited lands was liable to be seized in their stead.¹⁴⁸ Yet another restriction on the heir's liability to make *escambium* occurred where his ancestor's warranty had stipulated expressly that only certain of his lands were to be bound thereby, or that *escambium* would be made from land in a certain vill or county. Here the heir could not be required to make *escambium* except out of those lands to which his ancestor had referred.¹⁴⁹

That *escambium* could not be awarded out of lands that the vouchee had alienated before being vouched, was not a rule peculiar to heirs warranting the conveyances of their ancestors. It was a rule of general application equally applicable even when one vouched him who had created the warranty. One method of avoiding this pitfall was to bring in advance an action *de warrantia cartae* against one's warrantor while he yet had lands: on obtaining judgment in such an action those lands became bound to satisfy the warranty in case that warrantor should subsequently fail to defend one in one's seisin.¹⁵⁰ Another method was to draft the original clause of warranty in terms which bound specific lands of the donor, adding, perhaps, a covenant that he would not alienate those lands so as to destroy the warranty.¹⁵¹ A good illustration of this device is to be seen in a charter made by one John de Luvetot, witnessing that he had sold the manor of Hinxton (Cambs.) to X and his heirs, with a special clause of warranty purporting to bind the possessors of John's manor of "Kyngeswilberham" (Great Wilbraham, Cambs.), whoever they may be, which manor is not to be so alienated as to destroy this warranty.¹⁵²

heir, then withdrew his action with the intention of starting it afresh—so that the heir, when vouched anew, would be able to say that he had alienated before he was vouched.

¹⁴⁷ Y. B. 22 Ed. I (1294), R. S. 446, where the apprentices are speaking of *escambium* and Metingham J. of the primary duty to warrant.

¹⁴⁸ B. N. B. (1234), pl. 852.

¹⁴⁹ B. N. B. (1228), pl. 290 (*escambium* to be given in Devon); B. N. B. (1231), pl. 633 (*escambium* to be given in Bucks or Oxon); B. N. B. (1231), pl. 638 (lessee's *escambium* to be given out of lands at Toft); Y. B. 22 Ed. I (1294), R. S. 492–494 (vendor binds all his purchased lands; heir alienates them and so evaded *escambium*). See also S. S. 56 (Eyre Rolls, 1218–1219), pl. 97, which resulted in a concord—*ibid.* pl. 128; also S. S. 57 (1292 K. B.), pl. 35, an Irish clause of warranty restricting the amount of *escambium* to '50 librates of land only.'

¹⁵⁰ Fitzherbert, *Natura Brevium*, 134 K, 135 A.

¹⁵¹ See B. N. B. (1219), pl. 36, for an action on such a covenant (summarized *post*, note ¹⁵⁵). See also 2 P. and M. 215–216, that before the Statute of Wales, 1284, it was thought that a covenant not to alienate enabled one to recover the land from the covenantor's feoffee. There are hints in the cases that men make feoffments with warranty and then, instead of allowing their remaining lands to pass by inheritance to their heirs, convey those lands to the heir by feoffment *inter vivos*, so that the heir will be able to say (when vouched) that although he has lands by purchase he has nothing by descent: e.g. Y. B. 22 Ed. I (1294), R. S. 536.

¹⁵² Calendar of Charter Rolls, R. S. II (1290), p. 356: an *inspeximus* and confirmation of this charter by the King; for John held both manors direct of the Crown. That he held the manor of Great Wilbraham, is seen from another entry; *ibid.* (1281), p. 252; which shows the King granting him the right to hold there a weekly market and an annual fair. There is another instance in S. S. 56 (Eyre Rolls, 1218–1219), 105–107, where three charters made by one Alexander Fitz William were enrolled in full: the first two witness that he has granted various lands to a certain prior and convent in frankalmoin; the third witnesses that he has 'granted' to that prior and convent that he

§ 6.—HOW FAR THE BURDEN OF A WARRANTY COULD RUN
WITH LAND

The witnesses to the above charter (*circa* 1290) included three bishops and four earls. One can safely assume, I think, that only one learned in the law would have been entrusted with the drafting of a document of such importance. It is therefore significant that its warranty-clause used words which implied that, however strongly one attempted to bind specific lands to a warranty, they might not remain bound in the hands of an assignee.¹⁵³ To discover what really was the law on this important point during the thirteenth century is no easy task. Contemporary writers and reports contain little authority upon it, and that little is sometimes—and perhaps designedly—unenlightening. Bracton states that not only may ‘the person of the feoffor’ be bound by a warranty: ‘a tenement may also be bound together with the person.’ As an illustration, he gives the case of a charter wherein the donor said that he and his heirs will warrant the gift out of a certain tenement which they hold, to whomsoever it may come hereafter: and so, says Bracton, the thing will remain expressly bound by the warranty. As authority for this proposition, moreover, he cites a decision of 16 Hen. III, wherein one Alice ‘warranted by judgment of the Court because she had a tenement literally and specifically bound.’¹⁵⁴ There are two cases on the point in Bracton’s Note Book. One of them is evidently the very case that Bracton cited, above. The donor had given an express warranty for himself and his heirs, whereby, if they cannot warrant the gift, they will make *escambium*, ‘to the donee his heirs or assigns,’ out of certain London land of the donor; and this land was to remain bound, to whomsoever it might come, ‘to a full and sufficient warranty.’ The donor’s heir is vouched by the donee, but has no assets. By counsel of the Court, therefore, he who now holds the London land is to be summoned to tell by what means he acquired it ‘after it had been bound . . . to warranty,’ and to answer concerning the warranty.¹⁵⁵ The other case in the Note

will not sell or pledge any of his remaining lands in that locality without their consent and that of his superior lord. The obvious purpose of this ‘grant’ is at once to secure to the convent an *escambium* and to ensure that, should he fail to discharge the services due to the superior lord, there will be sufficient land whereby the latter may distrain him without disturbing the convent.

¹⁵³ Holdsworth considered this topic to some extent (3 H. E. L. 163—165) as a background to the decision in *Austerberry v. Oldham*. But he did not appear to distinguish between the two distinct questions: (i) is the assignee of such land bound to warrant (*i.e.*, defend); (ii) is he bound to give up the land as *escambium*? Moreover, he assumed (at p. 164) that a covenant not to alienate was void: contrast Maitland’s opinion, *ante*, note 151.

¹⁵⁴ Bract. f. 382, § 7. Bracton then proceeds to argue that all the land retained by a donor is impliedly bound to his warranty, since a warranty may be useless if the warrantor has nothing wherefrom *escambium* can be taken. He repeats this argument later (Bk. 5, Tract. 4, c. 7, § 7), and cites a case of 9 & 10 Hen III. But that case was a plea of dower; and the fact that the widow there recovered from her husband’s feoffee (the heir having nothing wherewith to endow her) was nothing unusual. One feels that Bracton was here suggesting what the law ought to be, not what it is. And he is contradicted by Hengham, *Magna*, c. 13, p. 46.

¹⁵⁵ B. N. B. (1233), pl. 748. Compare B. N. B. (1219), pl. 36, where *A* sued *B* for breach of a covenant not to sell or pledge certain lands, and the Court similarly ordered

Book was an express warranty, in a lease of land, whereby the lessor and his heirs were bound to warrant the lessee against all men throughout the term, failing which they were to warrant him from the lessor's land at Toft. The lessee is now suing the lessor's heir by writ of covenant founded upon the warranty, and the heir answers that the land at Toft has been leased to X. The Court decides that X must be summoned to show what right he has in that land, 'which was bound to' the plaintiff, and whereof the plaintiff 'says that it was bound to him before' X's lease was made.¹⁵⁶ In neither of these cases are we told what happened to the assignee of the bound land, when he ultimately came to Court. But I think one can fairly deduce from them and from Bracton (i) that the assignee of land specifically bound to warranty would be bound to make *escambium* from it if he acquired it after the warranty was made; (ii) that although the land was thus charged (as it were) with the warranty, to possess it did not mean that one would have to warrant in the strict sense—i.e., to come and defend someone else's action in court: for even the words of the warranty and Bracton's own words appear to indicate that this aspect of the obligation fell only upon the original donor and his heirs.

In the latter half of the century, most of the contemporary writers are silent or unhelpful,¹⁵⁷ save that Fleta deals with the subject in a manner reminiscent of Bracton.¹⁵⁸ But the Year Books show that the King's Justices are being troubled about it. (i) In 1292, a scribe notes that a vouchee who alienates after being vouched remains bound to warrant, and that the lands he so alienated can be taken in *escambium* if he have no others.¹⁵⁹ (ii) The same year, a defendant who alleged that his donor had bound the manor of Blackacre to warranty was prevented by Methingham J. from vouching together the heir and the tenant of Blackacre, but was permitted to vouch the latter alone:— 'Your voucher is bad. Vouch either the manor or the heir.'¹⁶⁰

that B's alleged assignees be summoned to show by what means they had entry into those lands contrary to the covenant.

¹⁵⁶ B. N. B. (1231), pl. 638.

¹⁵⁷ Hengham, *Magna*, c. 13, p. 46, merely says that lands retained by a donor are not bound by his warranty if his charter of gift does not say that he and his heirs *and assigns* ought to warrant. The reactionary author of the Mirror of Justices (S. S. 7, pp. 188—189) seems to disagree: he contends (somewhat ambiguously) that, if the donor's heir cannot warrant for want of assets, 'then the tenant must have recourse to the tenements that were bound by the warranty'; and he argues that, by ancient law, the fees of those that confess a debt [in Court ?] remain bound as security for that debt into whosoever hands they may come, and that an express warranty ought to have a like effect.

¹⁵⁸ Fleta, 6, c. 23, § 17: if X says in an express warranty that he and his heirs will warrant the gift out of certain land to whomsoever it may come, the tenement passes *cum onere*; hence subsequent possessors will be bound. He is evidently summarizing Bract. f. 382.

¹⁵⁹ Y. B. 20 Ed. I (1292), R. S. 302. The sense of this note is obscured by a mis-translation (what should be 'voucher' is translated as 'vouchee') and by an incomprehensible summary in the index (at p. 505). See also note ¹⁴⁵, *ante*, as to this aspect of the matter.

¹⁶⁰ Y. B. 20 Ed. I (1292), R. S. 358—360. The form of voucher here approved was to vouch W 'as tenant of Blackacre which is bound to warranty.' The unfortunate W was apparently the plaintiff, suing for her dower.

(iii) In 1294, a defendant vouched his donor's heir after being frightened away (by opposing counsel) from an endeavour to vouch the tenant of Blackacre—the land that the donor had specifically bound. The counterplea that had frightened him was an objection to the form of words in which he had attempted to vouch. He had said 'I vouch Z as tenant of Blackacre, which was bound to warranty.' What he ought to have said, says his adversary, was 'I vouch to warranty Blackacre, which is bound to me in warranty, and of which Z is tenant.'¹⁶¹ In (iii), and probably in (ii), the donor's heir had no assets by descent. The foregoing authorities, sparse though they be, seem clearly to confirm the conclusion offered at the foot of the previous paragraph—namely, that a purchaser of land from one who had specifically bound it to warranty was not himself bound to warrant (*i.e.*, to defend) the gift that his vendor had made. This conclusion, incidentally, finds some support in (and may serve to explain) a much quoted *dictum* of the early fourteenth century.¹⁶² Moreover, the fact that our period seems to provide no case nor statement to indicate that the action *de warrantia cartae* was ever brought against an assignee of land specifically bound to warranty tends to the same conclusion. Admittedly, the bound land that the assignee had purchased remained charged in his hands with a liability to make *escambium*; but that is a different matter. It would thus seem hardly accurate to say (as some modern writers have said¹⁶³) that the burden of a warranty could run with land. It was rather the burden of providing *escambium*, for default of warranty, that did so. And it seems likely that, in practice, even that burden did not in fact fall upon the land unless the original donor or his heir failed to implement the warranty and had nothing wherewith to make *escambium*.¹⁶⁴ In short, the probable theory of the thirteenth century was that, when land bound to a warranty was assigned, the warranty continued to bind the land as a potential source of *escambium* but did not bind the assignee personally. And if this conclusion correctly represents the situation, we may even say (as we say of covenants at the present day) that the assignee of land burdened with a warranty was not bound to do anything active to implement the warranty.

¹⁶¹ Y. B. 22 Ed. I (1294), R. S. 492—494. Presumably the reason why the defendant would not vouch thus was that, when one vouches land, one is only asking for *escambium* and so is impliedly admitting that the plaintiff's claim is unanswerable.

¹⁶² 'Nullus potest obligare assignatos ad warrantiam, quia warrantia semper se extendit ad haeredes qui clamant per successionem et non per assignationem': Y. B. 32, 33 Ed. I (1304), R. S. 516.

¹⁶³ *E.g.*, 3 H. E. L. 163; Holmes, Common Law, 395. Jenks, Short History of English Law (2nd ed.), 111, even said that every warranty had the effect that 'not merely the original warrantor and his heirs but all purchasers from him could be vouched to warranty'; but no authority was cited for this statement.

¹⁶⁴ Presumably the tenant of Blackacre (specifically bound) would vouch, in turn, his own donor or his heir. The latter was usually the very person whom the defendant could have elected to vouch. Clearly, therefore, there was sense in the system; for it brought into the chain of vouchers the bound land. The net result, therefore, was that the bound land would be taken in *escambium* if the defendant's donor (or that donor's heir) did not duly defend him in the action and had no other land wherefrom to make *escambium* to the defendant.

§ 7.—HOW THE BENEFIT OF A WARRANTY COULD RUN WITH LAND

As we have already seen (i) an express warranty might be so framed as to include expressly the grantee's assigns, as well as the grantee and his heirs; (ii) in no other case did a grantee's assign get the benefit of his warranty.¹⁶⁵ We have also seen that Bracton and his followers were able to justify the inclusion of a grantee's 'assigns' in a gift or clause of warranty on the ground that such assigns could be regarded as quasi-heirs of the grantee.¹⁶⁶ The advantage of expressly including 'assigns' in a warranty, he tells us, is that the grantee's feoffee will then have the option to vouch the original grantor (or his heir) direct if he so desire: otherwise he will only be able to vouch his own feoffor (or that feoffor's heir)—though the latter, of course, may then himself decide to vouch the original grantor (or his heir) rather than defend the action in his own person.¹⁶⁷ The power of a defendant, in an action brought against him for his land, to step over his own feoffor and the warranty that the latter had given him and to rely instead upon the warranty that his feoffor's feoffor had given might be a considerable boon. If the defendant's feoffor (or the latter's heir) had no assets wherefrom to make him *escambium*, and was unlikely, if vouched, to put up a good defence or to vouch one who could, the defendant's best plan clearly was to ignore that feoffor and to vouch the feoffor's feoffor instead: and this was the main purpose of mentioning 'assigns' in a clause of warranty.¹⁶⁸ There are several cases during our period in which a defendant produced the charter of feoffment (with warranty extending to 'assigns') made by his feoffor's feoffor, and vouched the latter or his heir direct.¹⁶⁹ And there are some in which a plaintiff produces such a charter and brings an action *de Warrantia Cartae* upon the warranty contained therein against his feoffor's feoffor or his heir.¹⁷⁰ That assigns so vouching or suing were required to produce such charters shows, incidentally, that purchasers even in the thirteenth century ought to require their vendors to hand over their title-deeds.¹⁷¹ Unfortunately, however, the cases of this early period have little to say as to who is and who is not an 'assign.' We learn that a donee's 'assigns' include the heir of his assign,¹⁷² but not the widower of the donee's heiress—whether as tenant by the curtesy or as guardian of her infant children.¹⁷³ In

¹⁶⁵ §§ 1, 2, *ante*.

¹⁶⁶ Bract, f. 17b. See also note 29, *ante*; and Holmes, Common Law, 373—374.

¹⁶⁷ Bract, ff. 390—391; also Fleta, 3, c. 14, §§ 6, 10, 11; Britton, 2, c. 8, § 8.

¹⁶⁸ Britton, 2, c. 8, § 8; Fleta, 3, c. 14, § 6.

¹⁶⁹ *E.g.*, B. N. B. (1233), pl. 748; Y. B. 20 Ed. I (1292), R. S. 232—238; Y. B. 22 Ed. I (1294), R. S. 570—576.

¹⁷⁰ *E.g.*, B. N. B. (1233), pl. 804; B. N. B. (1227), pl. 1771. These two are actions *de warrantia cartae*. In the former, the plaintiff-assign sued at the same time a writ of covenant as assignee of a lease. He succeeded in both.

¹⁷¹ Britton and Fleta gave this advice and for this reason: see note 168, *ante*.

¹⁷² Y. B. 20 Ed. I (1292), R. S. 232—238. Here Cave J. added *obiter* that it would not include the assign of an assign; but see the final paragraph of § 1, *ante*.

¹⁷³ B. N. B. (1227), pl. 1771; but the judgment indicates that he would have been an 'assign' had the donee enfeoffed him.

one case we even see a donee in tail claiming to vouch as his donor's 'assign'; but, to our disappointment, his voucher is disallowed on the mere technical ground that he failed to disclose in time the precise nature of his interest.¹⁷⁴ Evidently, the credit for the modern rule of our common law, whereby the benefit of a covenant relating to land runs only with the covenantee's *estate* in that land, can hardly be claimed by the law of warranty as it stood in the thirteenth century.¹⁷⁵ Indeed, the very notion of 'estates' belongs to a later age.¹⁷⁶ Nevertheless, the germ of the modern rule was present in Bracton's repeated assertions that an assign can benefit only because he is quasi-heir;¹⁷⁷ and there is evidence that Bracton's idea was remembered in the succeeding century.¹⁷⁸

(To be continued.)

¹⁷⁴ Y. B. 22 Ed. I (1294), R. S. 570—576. Perhaps one should assume that, had the form of his voucher been correct, the opposition would then have contended that he was not strictly an 'assign.' But there is no hint of this in the report.

¹⁷⁵ Holmes, Common Law, 375—376, argues strongly that it can. He relies upon Bracton's frequent *dicta* that the assign is quasi-heir (see notes ²⁹, ¹⁶⁶, *ante*), and upon the fact that Bracton cites a case for it, at f. 381. But Bracton's description of that case (*ibid.*) says nothing indicative of *estates*; and see note ¹⁷⁶, *post*.

¹⁷⁶ Maitland, 1 B. N. B., p. 134: 'It should be remembered the whole learning and even the very conception of "estates" belongs to a later time: Bracton had not the word "estate," nor any equivalent for it.'

¹⁷⁷ See Holmes, Common Law, 375—376.

¹⁷⁸ See the *dictum* quoted *ante*, note ¹⁶².

A CENTURY OF THE McNAGHTEN RULES

H. BARNES

THE subject falls conveniently into two parts, (I) comment made during the century since *McNaghten's Case* in 1843 on the answers given by the judges to the questions put to them by the House of Lords, and (II) discussion of the defence of irresistible impulse. For the convenience of readers the Questions and Answers are reprinted from the tenth volume of Clark and Finnelly's Reports, 200, 209—212.

(Q. I.) 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?'

(A. I.) 'Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.'

(Q. II.) 'What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?'

(Q. III.) 'In what terms ought the question to be left to the jury as to the prisoner's state of mind, at the time when the act was committed?'

(A. II and III.) 'As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one

that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.'

(Q. IV.) 'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?'

(A. IV.) 'The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.'

(Q. V.) 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?'

(A. V.) 'We think the medical man, under the circumstances supposed cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.'

I. COMMENT ON THE ANSWERS

During the century since Daniel McNaghten killed Mr. Drummond, there has been in England but little extension of the famous Answers¹, of the fourteen judges, usually called the Rules in *McNaghten's Case*. On the whole, perhaps the Rules were retrogressive.² Knowledge of right and wrong in the abstract had been the test: 'if you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent,' said Tindal C.J.³ In 1800, Erskine, for the defence, had argued, 'when a man is labouring under a delusion, if you are satisfied that the delusion existed at the time of the committal of the offence, and the act was done under its influence, then he cannot be considered as guilty of any crime.' 'Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity.'⁴ Erskine secured an

¹ See any of 10 Cl. & F. at p. 205; 4 St. Tr. (N. S.) at p. 296; 31 Arch. 14; 1923, Cmd. 2005, at p. 23; East, Forensic Psychiatry, 55; Kenny, Select Cases, 44; Stephen, II History of Criminal Law, 155.

² *State v. Jones* (1871) 50 N. H. 369.

³ 4 St. Tr. (N. S.) at p. 925.

⁴ *Hadfield* (1800) 27 St. Tr. at pp. 1313-1314; 67 Hansard, 719.

acquittal; but in 1812 it was held that delusion was only important in so far as it was evidence of inability to distinguish right from wrong.⁵ Maule J. stood by this test, and gave able Answers of his own to the House of Lords; answers which deserve more attention than they usually get, and lack the verbosity and ambiguity of the usual speech of that time. He said, 'the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong.'

In point of law the Rules had no binding authority; they were opinions, not judgments. In course of time they have attained authority, through reference being constantly made to them, through being stated to juries in important trials, and through the tremendous influence they have had wherever the English law is consulted.⁶

There is, however, hardly a sentence in the Answers that has not been the subject of criticism; and there is hardly an interpretation that has not been varied in some jurisdiction where the Rules are authority. I shall call attention briefly to some of the comments that have been made.

Answer to Questions 2 and 3: the Quantum of Proof of Insanity. There is persuasive authority for saying that the burden of proof on the defence 'may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings':⁷ civil cases may, of course, be proved by a preponderance of evidence, whilst criminal charges must be proved beyond a reasonable doubt.⁸ In a defence in a criminal case, the general rule is that the accused need only produce evidence which raises a reasonable doubt.⁹ It had been foreshadowed in 1800 that the general rule would apply in the defence of insanity, when Lord Kenyon C.J. said, 'yet if the scales hang anything like even, throwing in a certain proportion of mercy to the party.'¹⁰ But this is not necessarily the practice in the English Courts: the words used in the Rules signifying the quantum of proof are 'clearly proved'; 'it is not "suggest," nor "indicate," nor "insinuate," nor any such word, but "prove."'¹¹ More must be proved than in civil cases; Campbell, when Attorney-General, pointed out that 'in criminal cases the evidence of insanity must be connected with the particular act.'¹² Rolfe B. (afterwards Lord Cranworth) said: 'the jury must be satisfied that he actually was insane. If the matter be left in doubt it will be their duty to convict him.'¹³ The Irish Court of Criminal Appeal has twice affirmed

⁵ *Bellingham* (1812) 1 Collinson on Lunatics, 636.

⁶ *E.g.*, Indian Penal Code, s. 84. In nearly all the United States of America: *Weihofen*, *Insanity as a Defence in Criminal Law*, 46.

⁷ *Sodeman* (1936) 55 Comm. L. R. 230; W. N. 190; 2 All E. R. 1138. The State of Alabama established this Rule by cases, and changed it by the 1928 Code, 'to the reasonable satisfaction of the jury.'

⁸ Phipson, *Evidence*, 10.

⁹ Phipson, 34.

¹⁰ *Hadfield* (1800) 27 St. Tr. at p. 1354.

¹¹ Hewart, *Essays and Observations*, 213; 5 *Journal of Criminal Law*, at p. 267.

¹² *Oxford* (1840) 9 C. & P. at p. 533.

¹³ *Stokes* (1848) 3 Car. & Kir. 185.

recently that the proof of insanity must be beyond reasonable doubt.¹⁴ Phipson is of the same opinion.¹⁵

Answer to Questions 2 and 3: the words 'nature and quality.' It has been held that the judges were only dealing with the physical character of the act, and were not intending to distinguish between its physical and moral aspects.¹⁶ This interpretation has not been universal; some Courts have taken the rejected meaning.¹⁷ Still, it is possible that the words are capable of another, and purely physical, interpretation; the phrase is 'know the nature and quality'; the key word seems to be 'know'; this might mean that the person did not know he was committing an act at all, or it might mean that, although he knew exactly the act he was doing, he could not appreciate its consequences; for example, he may know he is striking a plate with a hammer, yet he may not appreciate that the plate will break. Presumably, from the above judgment,¹⁶ the phrase means that he must not know that he is striking a plate at all.

One might remark here that it would be very convenient to take the Answer to Questions 2 and 3 as referring to general insanity; but that was not intended by the judges. They took the questions together; and Question 2 specifically refers to 'delusion respecting one or more particular subjects or persons.' The practice of the Courts has come to be to apply the Answer to 2 and 3 to all cases of insanity, including types that have nothing to do with delusion, the dementia præcox group, for example.¹⁸

Answer to Questions 2 and 3: the words 'or, if he did know it, that he did not know he was doing what was wrong.' The word 'wrong' may mean 'illegal' or 'morally wrong': Sir James Stephen thought that the question was open.¹⁹ It also might mean both. Medical works usually take it that by 'right and wrong' lawyers mean 'lawful and unlawful.'²⁰ The Court of Criminal Appeal, combining the words 'that he did not know he was doing what was wrong' with the sentence which comes later in the same Answer: 'if the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable,' seems to have concluded that the judges meant that if the accused 'knew that the act was wrong in law, then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was punishable by law.' The Court made it clear that the test was not to be the accused's own moral standard of right and wrong.²¹ Much the simplest meaning of the word 'wrong' is 'illegal': the scope of criminal wrongs can be known exactly, at any particular time, in any community, by ascertaining

¹⁴ *A.-G. v. Boylan* [1937] I. R. at p. 456; and *A.-G. v. Fennell* [1940] I. R. at p. 449.

¹⁵ Phipson, 34; and cites Bigham J. in *Jefferson* (1908) Times, 20 July.

¹⁶ *Codere* (1916) 12 C. A. R. at p. 27.

¹⁷ *E.g., Schwartz v. State* (1902) 65 Nebraska, 196 (S.C.).

¹⁸ *Lockhart* (1939) Telegraph, 20 Nov.

¹⁹ Stephen, II Hist. 149; and Digest of the Criminal Law, s. 38 (b), and note 6.

²⁰ I Taylor, Medical Jurisprudence, 807.

²¹ *Codere* (1916) 12 C. A. R. at pp. 27—28.

what acts have been declared by the State to be crimes.²² Although legislation creates and repeals rights and wrongs with great variability, it still is a stable, if rather artificial, test of criminal wrongs existing at any particular time.²³ Any moral code changes with different times, conditions, and places; and often changes subtly and without much obvious publicity. To adopt a moral code as the test of wrong would make it very difficult to assess the accused's knowledge of the ethics of his act, as possessed by him at the time when he did the act; the inclination would be to fall back on general common knowledge, and imply that he must have possessed that. Nevertheless, a very eminent judge, Cardozo J. has held that moral wrong was the correct meaning; 'the Judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong.'²⁴ Some writers have also taken this view, for example, 'it is the capacity to determine the moral quality of the act that determines his responsibility in a legal sense.'²⁵ In some countries wrong is taken to mean either illegal or morally wrong; for example, 'or that he is doing what is either wrong or contrary to law.'²⁶

Answers 1 and 4. Both the Questions and Answers definitely refer to what was known to the judges as 'delusional insanity.' Answer 1 applies the test of knowledge of illegality: 'if he knew at the time he was committing such crime that he was acting contrary to law . . . to mean the law of the land.'

Answer 4 introduces an additional test; sometimes aptly called 'the mistake of fact test.' Apparently this test had not been mentioned in any case, or text-book, prior to 1843. It is not easy, taking the first three Answers together, to see what the judges meant: the First Answer makes the test knowledge that he was breaking the law; the Second Answer may be based on the same test, or it may refer to a knowledge of moral wrong. Whether the Mistake of Fact test is intended to apply to Answers 1 and 2, or whether it is a separate test, is not clear. What the judges seem to have had in mind in Answer 4 was that the delusion must be connected with the offence and with the person against whom the offence was committed.²⁷ This connection may be very difficult to establish, and yet may exist quite plainly and reasonably to the mind of the accused. The mind of an insane person is not straightforward, its arguments are twisted and illogical, its conclusions faulty, and, as Sir James Stephen wrote, 'there may be a connection between the delusion and the crime as insane as the delusion itself.'²⁸ It is submitted

²² *Proprietary Articles Trade Association v. A.-G. for Canada* [1931] A. C. at p. 324.

²³ See also IV Criminal Law Journal, at p. 87.

²⁴ *People v. Schmidt* (1915) 216 N. Y. 324.

²⁵ XCI Review of Amer. J. Psych. 137. ✓

²⁶ Indian Penal Code, s. 84. See also for Scotland, *H.M. Advocate v. Sharp* [1927] S. C. (J.) 66.

²⁷ Stephen, II Hist. 162. Also 2 Journ. Crim. Law, 539.

²⁸ 1 Taylor, 815.

that the questions to be put to the jury ought to be, (i) has the accused a delusion? and, if so, (ii) is the delusion sufficient evidence of insanity? 'After all, the mere fact that a man thinks he is John the Baptist does not entitle him to shoot his mother,' argues Lord Hewart.²⁹ No, but it might if he had mistaken her for Herodias.

In Answers 1 and 4 the judges referred to 'partial delusion.' This unfortunate expression has been the cause of much confusion to juries; and of much controversy between the legal and medical professions. The Answers were made at the time when Gall's theory of phrenology was at the height of its popularity; a theory that the brain was an aggregate of independent parts, each of which contained a special 'faculty,' and each part capable of individual deterioration without general brain debilitation.³⁰ 'There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane.'³¹ 'The theory of partial or limited insanity is untenable, the mind functions as a whole and is disturbed as a whole.'³² In fact, apart from criminal cases, the legal profession in England was taking the same view nearly a century ago. The headnote of a case in 1848³³ reads, 'if the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance . . .; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.' Horridge J. has stated, in the Court of Criminal Appeal, that delusions were evidence of general insanity; and the Court set aside a conviction for murder, and substituted a verdict of guilty but insane.³⁴ It is submitted that the 'delusion test' is no longer accepted anywhere; and, in England, the Courts are inclined to ignore Answer 4, largely ignore Answer 1, and sum up to the jury under Answer 2 in all cases.

Answer 5. Before 1843, it had already been questioned if a medical witness could be asked, after hearing the evidence, whether the act charged was an act of insanity: he could be asked whether such and such appearances are symptoms of insanity.³⁵ Later, it was allowed to ask whether, on the particular acts proved, the witness thought the accused was insane when he did the act.³⁶ Tindal C.J. put the direct question to two medical witnesses at the trial of McNaghten.³⁷ In reply to Question 5, Maule J. was of the opinion that there might be occasions when either question ought to be asked and answered. But the fourteen judges laid down this Rule: a medical man, who has heard

²⁹ Hewart, *Essays*, 224.

³⁰ East, *Medical Aspects of Crime*, Cap. VII, for a careful description, with charts.

³¹ East, *Forensic Psych.* 58; 1 Taylor, 815.

³² *British Medical Journal*, 1924, 16 Feb.

³³ *Waring v. Waring* (1848) 6 Moo. P. C. 341.

³⁴ *Gilbert* (1914) 11 C. A. R. at p. 25.

³⁶ *Francis* (1842) 4 Cox, 57.

³⁵ *Wright* (1821) R. & R. 456.

³⁷ 4 St. Tr. (N. S.) at p. 923.

the evidence, but who has not seen the accused before the trial, ought not to be asked his opinion on (i) the state of accused's mind when he did the act; or (ii) whether accused had been suffering under any delusion at the time, or knew when he did the act that he was acting contrary to law: unless such question is one of science only: for otherwise it is the very question of fact that the jury is there to decide.

Commenting on this Rule, Sir James Stephen thought that medical men should inform the Court whether any given form of madness might affect a person's knowledge that an act is wrong, or his power to abstain from doing it.³⁸ It is submitted that the question is always one of 'science only'; and that an alienist is much more competent than the jury to say, from the evidence, whether or not the accused was insane at the time when he did the act. The question means insane as defined by law; it leaves no room for speculative medical opinion about the matter. Expert evidence is freely received on a large variety of scientific and technical topics. A doctor can give evidence as to the effect of a wound:³⁹ he can be asked about the state of an insured person's health at the time the policy of insurance was effected.⁴⁰ Counsel and judge will express their opinions on accused's state of mind. There seems to be a common—and fallacious—assumption that although physical diseases require professional diagnosis, mental disease can be detected by any jurymen. In some cases it is obvious that accused is to some extent abnormal; but whether or not accused was capable of knowing right from wrong is a medical question; and to deprive the jury of the aid of the alienist is to leave the answer to conjecture.

In 1923, the Committee on Insanity and Crime recommended⁴¹ that it should be open to accused, or to the prosecution, or to the committing magistrate, to apply to the Home Office for expert medical examination of accused, as to the state of his mind: but it did not recommend the formation of a panel of experts. A very advanced reform of this nature is in operation in the State of Massachusetts, where any indicted person charged with certain offences must be turned over to the Department of Mental Diseases for examination as to his mental condition.⁴² In 1909, the State of Washington abolished the defence of insanity; the jury was to decide on the act only; and, if, in the judgment of the Court, accused was insane at time of trial, he might be ordered to be confined until he recovered: this reform was held unconstitutional by the Supreme Court.⁴³ In the State of Colorado, on the defence of insanity, the accused is remitted to a psychopathic hospital for a period of observation.⁴⁴

It is submitted that the judge should be allowed, at his discretion, to put direct questions to an alienist as to the state of mind of accused.

³⁸ Stephen, II Hist. 183.

⁴⁰ *Aveson v. Kinnaird* (1805) 6 East, 188.

⁴¹ 1923, Cmd. 2005, at p. 10.

⁴³ *State v. Strasburg* (1910) 60 Wash. 106.

⁴⁴ See *Arridy v. People* (1938) 82 Pac. (2nd) 757; where, in spite of the experts' opinion, popular opinion was too strong, and accused was convicted and executed.

³⁹ *Mason* (1912) 76 J. P. 184.

⁴² Mass. Acts, 1929, Cap. 105.

In practice, such questions are sometimes permitted.⁴⁵ Perhaps the greatest objection to accepting the opinion of such a medical witness is that, under the present system in England, he is usually partisan; the judge does not control the experts, he acts rather as an umpire than as a judge. Were the judge to be allowed to call an impartial expert witness, at the public expense, it would do much towards restoring confidence in expert testimony. In English Criminal Courts, the accused cannot be questioned unless he elects to be called as a witness. Even if he does so elect, open Court might not be the most suitable surroundings in which to make a psychiatric examination of his state of mind; and counsel, unless he is also an alienist, is not always lucky in his questions. The significance of symptoms, even if they are obvious, is not always appreciated by counsel and jury.⁴⁶ The difficulty, and danger, lie in assessing the value of the evidence. The deceiving thing is that the person can often perform some acts quite rationally, or even with exceptional cleverness. John Clare, the pastoral poet, had two delusions; that he was the greatest prizefighter in England, and that he had two wives and families. He could not converse, or write prose, for two sentences, without disclosing his insanity; yet he could write delightful poetry without showing a trace of it.⁴⁷ Again, there seems to be no disease of insanity with unalterable common symptoms; there are a great variety of individual diseases grouped under the description of insanity. 'There is no definite dividing line between sanity and insanity, one state passes imperceptibly into the other.'⁴⁸ Insanity, in its widest aspect, means 'brain inadequacy for its environment': a description covering everything from mania to eccentricity; but somewhere between the two is the division between disease and vice, and no line clearly marking that division can be fixed by law or medicine. As a starting point, one should search for impossibility of reasoning or control in the insane, as contrasted with indifference to consequences in the vicious. The inexperienced sane person may not find it easy to detect insanity, he distrusts the unexpected, there is something in the remark, 'a man who has more brains than his fellows necessarily appears as mad to them as one who has less.'⁴⁹ To the lawyer, the criminal act seems the most important thing in the question of insanity; to the doctor the act is only one particle of evidence in the history of the disease, he is interested in the whole conduct of the patient.⁵⁰ The medical man thinks that the progress of psychiatry must modify the legal criteria of criminal responsibility; the true mental condition of the patient, and his behaviour reactions, must afford the basis for determining responsibility.⁵¹ Really, there must be collaboration between the two professions; they keep each other in check. The medical profession, left to itself, is capable of making

⁴⁵ See *Hay* (1911) 22 Cox, 268.

⁴⁶ See *Jefferson* (1908) 1 C. A. R. 95.

⁴⁷ J. W. and Anne Tibble, *John Clare*, 385, 393, 397, 417.

⁴⁸ I Taylor, 759, 811.

⁴⁹ G. Bernard Shaw.

⁵⁰ Brazol, *Elements of Crime*, 302.

⁵¹ Kindred, 1934, *Amer. Jour. Psych.* 137.

suggestions which are much more vague, and more unsuitable for the procedure used in criminal trials, than the Rules in *McNaghten's Case*.⁵² Better take each case as it arises, apply all medical knowledge available, test it with the legal acumen of the lawyer, and leave the answer to the common sense of the jury.

Unfit to plead. When a jury finds that an accused person is unfit to plead, he is sent to a criminal lunatic asylum during the King's pleasure. The public does not always realize that the accused has *not* been tried for any offence; and that no evidence whatever has been called to connect him with the offence with which he was charged, or to ascertain his mental condition at the time the act was done: the only enquiry is as to his fitness to plead. There is some scope for collusion and injustice here; although no actual cases of injustice—mistaken identity, for example—appear to have been reported. The Committee for Insanity and Crime recommended that accused should not be found unfit to plead except on the evidence of at least two doctors: but it did not recommend any right of appeal.⁵³

II. THE DEFENCE OF IRRESISTIBLE IMPULSE

When Daniel McNaghten shot Edward Drummond on the 20th January, 1843, he apparently mistook him for Sir Robert Peel. McNaghten was a paranoiac, with a well-developed system of delusions of persecution by Jesuits, priests, police, and Tories, apparently developed in that order, and eventually centering on Sir Robert Peel. Paranoia may consist in elaborate systematization of insane ideas with relatively little evidence of other impairment of psychic function.⁵⁴ McNaghten was tried for murder before Tindal L.C.J., Williams and Coleridge JJ. The medical evidence⁵⁵ in substance was 'that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception (of right and wrong); and that he was not capable of exercising any control over acts which had connection with his delusion.' The jury found him 'not guilty on the ground of insanity.' The case aroused much public interest, and the House of Lords, after debate, determined to take the opinion of the fifteen judges (which included the three trial judges) on the law governing such cases.⁵⁶ So the five Questions were asked and answered.

Criticism of the Rules commenced in the House of Lords itself; Tindal C.J. protested that 'they deemed it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute application of the principles involved in the Answers.' Maule J. protested that the questions were

⁵² For a good example, see 1923, Cmd. at pp. 31 and 4.

⁵³ 1923, Cmd. 2005, at pp. 9 and 21.

⁵⁵ 10 Cl. & F. 201; 4 St. Tr. (N. S.) 923.

⁵⁴ Sullivan, *Crime and Insanity*, 122.

⁵⁶ 10 Cl. & F. 202. The case of *True* in 1922 brought about the appointment of Lord Birkenhead's Committee of that year.

put without reference to the facts of any particular case, and that the Answers given might embarrass the administration of justice. In fact, the Questions were really in reference to *McNaghten's Case*, all the judges knew it, and the Answers were made in respect to the type of insanity with which the judges understood McNaghten to be afflicted.

Few writers have noticed that the judges made some effort to individualize each case, in Answer 2: 'That the jury ought to be told . . . , accompanied with such observations and explanations as the circumstances of each particular case may require.' This appears to leave an opening for extending the Rules to new types of insanity. However, it is not easy to deny that the Rules in themselves are vague and confusing, unsound in principle, and do not provide for the most difficult questions in connection with mental disease.⁵⁷ The inadequacy of the Rules has been widely recognized; in England, there have been special enquiries on several occasions; and the majority of witnesses have agreed that the Rules were unsatisfactory.⁵⁸ Normally, law does not stand still; it develops with national growth, and the increase of scientific knowledge: in the defence of insanity the McNaghten Rules may be an exception. Beyond recognition of newly defined types of insanity that would come within them, it is debatable whether there is any tendency to broaden the Rules by judicial interpretation. Some judges have endeavoured to extend the application of the Rules, but their efforts have met with the strong disapproval of some eminent lawyers.⁵⁹ Perhaps there is a feeling that Rules established for so long ought not to be enlarged by judicial decision; but the recommendations for statutory enlargement were also always strongly opposed, and have not been enacted:⁶⁰ the opposition was on principle, not on method. In 1922, the Court of Criminal Appeal explicitly reaffirmed the authority of the McNaghten Rules.⁶¹ It is worth noting, however, that the most formidable opponents to the extension of the Rules have now gone to their rest.⁶² Sir James Stephen, writing in 1883, thought that the Court for Crown Cases Reserved had never delivered a considered written judgment on the relation of insanity to criminal responsibility.⁶³ The pronouncements of the Court of Criminal Appeal in 1922 and 1925⁶⁴ were definite enough; unless we are prepared to follow the line taken by medical writers, that, as there was no evidence to support the defence of irresistible impulse in the particular cases, it was not in issue, and the pronouncements against it have not necessarily more than persuasive weight.⁶⁵ The reply to that argument is that the question will never get before the Court of Criminal Appeal on the direct issue; because,

⁵⁷ Stephen, II Hist. 154; Sullivan, 230.

⁵⁸ *E.g.*, in 1865, 1874, 1879, 1922.

⁵⁹ *E.g.*, Bramwell B., *Insanity and Crime*, Nineteenth Century, Dec. 1885; Hewart, *Essays and Observations*, 215.

⁶⁰ *E.g.*, 1923, Cmd. 2005, p. 21.

⁶¹ *True* (1922) 16 C. A. R. at p. 170.

⁶² Notably, Bramwell B., and Hewart L.C.J.

⁶³ Stephen, II Hist. 152; 1 Taylor, 801; Theobald, *Law Relating to Lunacy*, 244.

⁶⁴ See discussion, *post*.

⁶⁵ Sullivan, *Crime and Insanity*, 231.

when the jury acquits (and a verdict of guilty but insane is one of acquittal⁶⁶), the Crown, by long usage, does not appeal.

The great weakness of the McNaghten Rules is that they treat criminal responsibility as a question of intelligence only, and not of the will; a recognition of cognition, but not of conation and emotion.⁶⁷ 'Conduct is fundamentally dictated, not by the intellectual or cognitive, but by the emotional faculties. Sensation, instinct, desire, will, are the springs of conduct. . . . It is possible that will may be hopelessly erratic, decayed, and imbecile, while the intelligence still functions clearly.'⁶⁸ 'One would say in the end that the mind belonged to the whole brain and not to any single part of it.'⁶⁹ The fifteen judges regarded insanity as a disorder of the intellectual faculties; modern psychiatrists regard it as a morbid change affecting all the mental faculties. The effect of insanity on the will could not arise on the Questions put to the judges, for such a question was not asked; the Questions refer to 'insane delusion.'

Ray, writing in 1838, described how greatly the study of insanity had advanced since Hale's time.⁷⁰ In a recent Irish judgment Kennedy C.J. said, 'the scientific exploration of mental diseases has in modern times been pursued with results to knowledge not contemplated at a time not very remote from the present. A vast area of research and discovery lies in the relatively short period of time between Hogarth's cartoon of Bedlam and current theories of the upsetting of the glandular balance of the human body.'⁷¹ Any newly recognized form of intellectual aberration, provided the criminal act stands in logical connection with the intellectual derangement, will come under the McNaghten Rules; but disturbances of the conative and emotional mental processes have not been brought under the Rules. Putting it simply, all medical authorities are now convinced that a person may know the nature and quality of the physical act he is doing, may know that it is legally and morally wrong, and still be unable to keep himself from doing it. This is now known as 'irresistible' or 'uncontrollable' impulse. The dispute about the recognition of the defence of 'irresistible impulse' has not been confined to the English Courts; the battle over it is universal.⁷²

In England proposals have been made to enact the defence of irresistible impulse by legislation. The last of these was made by the Committee on Insanity and Crime⁷³ appointed in 1922; in its Report of 1923, which also contains a summary of the existing law, of the evidence before the Committee and its reactions to it; and of suggestions made by the medical profession. The two main recommendations were:—

- (1) It should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed

⁶⁶ *Felstead* [1914] A. C. 534; 10 C. A. R. 129.

⁶⁸ Marjoribanks, *Life of Sir Edward Marshall Hall*, 390.

⁶⁹ Prof. Jefferson, Lecture, 'Manchester Guardian,' 20 Jan. 1944.

⁷⁰ Dr. Ray, *Medical Jurisprudence of Insanity*.

⁷¹ *A.-G. v. O'Brien* [1936] I. R. at p. 269.

⁷² See references to it, *post*.

⁶⁷ Weihofen, 46.

⁷³ 1923, Cmd. 2005.

under an impulse which the prisoner was by mental disease in substance deprived of any power to resist. It may require legislation to bring this rule into effect.

(2) Save as above, the Rules in *McNaghten's Case* should be maintained.

The words 'in substance' might be the source of much fruitless argument. The words 'may require' at least suggest that other means than legislation might be tried.

The Criminal Responsibility (Trials) Bill was introduced in the House of Lords by Lord Darling, in 1925; in which it was proposed to add to the McNaghten Rules that the accused is entitled to a verdict of not guilty on the ground that he was insane 'if at the time the act was done or omission made he was suffering from such a state of mental disease as therefrom to be wholly incapable of resisting an impulse to do the act or make the omission.' The Bill was opposed by several peers holding high judicial office, and met with very strong opposition from Lord Hewart, who told the House that he had consulted twelve of the fifteen King's Bench Division judges; ten of them, like himself, emphatically opposed the measure; one was as emphatically in favour of it; and one was doubtful.⁷⁴ Lord Hewart's reasons for opposing the Bill were mainly as follows:—

- (1) If the suggested modification were accepted, it would be immaterial that the prisoner knew what he was about, or that he knew he was doing what was wrong.
- (2) All the passages from text-books, summing-up of judges, and decisions in favour of the defence of irresistible impulse, lack the approval of the Court of Criminal Appeal. The Crown does not appeal.
- (3) The difficulty of distinguishing between an irresistible impulse, and an impulse that was simply not controlled: it is impossible to distinguish a person moved by desire of gain or revenge.
- (4) The tendency of juries to respond to 'much eloquence and some evidence.'
- (5) The medical man is primarily concerned with the interests of his patient; the Criminal Law is concerned with public security.⁷⁵
- (6) The accused, if found guilty, could appeal: and there are other statutory provisions available for his protection; so no injustice is ever done in these cases.

Lord Darling withdrew the Bill; and that ended the last attempt at legislation on irresistible impulse.

None of the reasons given by Lord Hewart is final. Jurymen have a fairly high qualification in England, they are men of standing and intelligence, and they have common sense and try to use it. Lord

⁷⁴ XVII Parl. Debates (5th Series); Hewart, *Essays and Observations*, 225; also Cap. XXIX.

⁷⁵ Like Baron Bramwell, Lord Hewart appears to have been a firm believer in the efficacy of the threat of punishment.

Hewart, in giving judgment in an appeal, has said : ' whatever the composition of a British jury may be, experience shows that its unanimous judgment is entitled to respect.'⁷⁶ An English criminal trial is more inquisitorial than litigious, and the proper attitude of all concerned in it is to get at the truth. There is no greater intellectual difficulty in understanding and applying the irresistible impulse test than there is in applying the tests under the McNaghten Rules. The only difficulty is in assessing the value of the evidence; and the jury can be instructed on such values. There are many helpful bits of knowledge available to assist the Court and jury. Books on Medical Jurisprudence and on Psychiatry invariably warn the medical witness (and the lawyer) that he must not support any defence of insanity unless some mental disease or instability is found in the accused;⁷⁷ after that is established, evidence of insanity in parents and near relatives may be pertinent.⁷⁸ Certain diseases are exceptionally likely to give rise to an irresistible impulse; that is, they may not visibly affect cognitive stability, and yet cause conative instability. It is common in paranoia, particularly with persecution beliefs.⁷⁹ It is usual in the Manic-Depressive Psychoses.⁸⁰ It is very common in epilepsy.⁸¹ It is very common in Puerperal mania.⁸² It is indicated in cases of sex offences where the attack is open and indiscriminate, without selection of a favourable occasion.⁸³ It is frequent in cerebral hæmorrhage, where there can be mental confusion for some length of time, with violent attacks on relatives and friends.⁸⁴ The collateral evidence is important; the act is always committed without collusion or planning; there is no sane motive, but only desire; indifference as to the victim; there is no attempt at escape; or concealment; and no denial.⁸⁵ Incidentally, paranoia and mania are difficult to feign.⁸⁶

On the other hand, Courts seem almost universally to have rejected such defences as moral insanity; which seems to mean desire uncontrolled by conscience:⁸⁷ or suggestions that accused was sane just before the act, insane when he committed it, and sane immediately afterwards; ' temporary insanity is not known to English law.'⁸⁸ Eccentricity is not insanity; in eccentricity there is will to do or not to do, and a deliberate flouting of the general rules of conduct.⁸⁹ As sane men are not all of equal mental ability, so a person far enough below the average to be classed as mentally deficient is not necessarily insane.⁹⁰ A superstitious

⁷⁶ *Armstrong* (1922) 16 C. A. R. at p. 160. See also on juries, *Morris*, *Criminology*, 283.

⁷⁷ 1 Taylor, 812; *Gour*, *Indian Penal Code*, 321.

⁷⁸ *Maule J.* in *Tucker* (1844) 1 Cox, 103; *Cox J.* in *U. S. v. Guiteau* (1882) 10 Fed. 161.

⁷⁹ *Dr. Monro*, 4 St. Tr. (N. S.) 847.

⁸⁰ *Christie*, 10 *Medico-Legal and Criminological Review*, 13.

⁸¹ *East*, *Forensic Psych.* 83; *Perry* (1919) 14 C. A. R. 48.

⁸² 1 Taylor, 814.

⁸⁴ 4 *Criminal Law Jour.* 82.

⁸⁶ 1 Taylor, 843.

⁸⁷ *De Quiros*, *Modern Theories of Criminality*, 8, 49; *Burton* (1863) 3 F. & F. 772.

⁸⁸ *Darling J.* in *Harding* (1908) 1 C. A. R. at p. 223; *State v. Soper* (1899), 148 Mo. p. 237.

⁸⁹ 1 Taylor, 762; *Vaughan* (1844) 1 Cox, 80.

⁹⁰ *Alexander* (1913) 9 C. A. R. at p. 141; *Lesbini* (1914) 11 C. A. R. 7.

⁸³ 1 Taylor, 828.

⁸⁵ 1 Taylor, 815—819.

belief in witchcraft,⁹¹ or a fantastic belief that killing the President was the only possible way to unite the two factions of the Republican Party and save the Republic,⁹² did not prove insanity. On this side also, the collateral evidence is important; evidence of motive, preparation, design, disguise, escape, or denial, may negative insanity.⁹³

Legislation having failed in 1925; it remains to consider the forensic efforts that have been made to establish the defence of irresistible impulse, and the arguments and persuasive authority against and for its establishment through judicial decision. We shall consider first the unsuccessful efforts.

Stroud, after a careful consideration of all the literature and cases down to 1914, was strongly of the opinion that no case had been made out for the defence of irresistible impulse.⁹⁴ He concluded 'that no impulse ought to be admitted as an excuse for crime, unless proved to be irresistible in the extreme sense that nothing but mechanical restraint could have prevented the act.' The Committee on Insanity and Crime said 'there seem to be definite decisions of the Court of Criminal Appeal the other way . . . it would be advisable to make the law clear by an express statutory provision. We have no doubt that if this matter were settled most of the criticisms from the medical point of view would disappear.'⁹⁵ After summing-up the various Enquiries and Commissions, and cases to 1936, a recent article suggests the conclusion that no further efforts towards establishing the defence are likely to be made by the Courts in the near future.⁹⁶

By 1843 there was a decided difference of opinion between the medical and legal professions; the medical profession had recognized irresistible impulse, but it did not appeal to the judges. Rolfe B.: 'it is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly compelled to do some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission?'⁹⁷ Parke B. expressed his 'decided concurrence' . . . 'it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.'⁹⁸ Irresistible impulse was no defence if he knew the act was wrong.⁹⁹ Where the evidence showed no motive, Bramwell B. said: 'The circumstance of an act being apparently motiveless is no ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless (but resistible) thirst for blood

⁹¹ East, *Forensic Psych.* 21—22.

⁹² *U. S. v. Guiteau* (1882) 10 Fed. 161.

⁹³ *Southey* (1865) 4 F. & F. 864.

⁹⁴ Stroud, *Mens Rea*, 195—209.

⁹⁵ 1923, Cmd. 2005, at p. 9.

⁹⁶ D. Seaborne Davies, 17 Can. Bar Review, 147.

⁹⁷ *Stokes* (1848) 3 C. & K. 185.

⁹⁸ *Barton* (1848) 3 Cox, 275.

⁹⁹ *Brough* (1856) 1 F. & F. 667 n.

would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence: the restraint of religion, the restraint of conscience, and the restraint of the law. But if the influence itself be held a legal excuse rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must return therefore to the simple question you have to determine: did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong? ¹⁰⁰ Wightman J.: ‘He was quite conscious of the nature of the act and of its consequences. He was supposed to desire to be hanged, and in order to attain the object, committed murder. That might show a morbid state of mind, but not delusion . . . The question for the jury was whether he was incapable of knowing that what he did was wrong.’ ¹⁰¹ The judge is not bound to put a defence of impulsive insanity to the jury: ‘impulsive insanity is the last refuge of a hopeless defence.’ ¹⁰² ‘He knew that he was shooting, and that this shooting would kill her.’ ¹⁰³ ‘The tests in *McNaghten’s Case* must be observed, and it is not enough for a medical expert to come to the Court and say generally that in his opinion the criminal was insane.’ ¹⁰⁴ ‘Uncontrollable impulse is not a defence in law.’ (The case does not seem to justify the head-note.) ‘The law of England had long laid down that evidence of premeditation, deliberation, and the gratification of revenge ought to be taken into account.’ ¹⁰⁵ ‘It is enough to say that in the view of this Court there is no foundation for the suggestion that the Rule derived from *McNaghten’s Case* has been in any sense relaxed. Those who seek to rely upon individual passages in this or that summing-up should not omit to observe that, as the law now stands, the prosecution has no appeal to this Court.’ ¹⁰⁶ ‘It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be very subversive. It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so.’ ¹⁰⁷ In a case before the Court of Appeal after the Commission had reported in 1923, it was argued that the Court should interpret the *McNaghten* Rules so as to make them compatible with the discoveries of science. It was said, ‘We desire to express no opinion on the desirability of altering the law, or whether it should be altered by legislation or by pronouncements in this Court. But we do say not only that the Rules in *McNaghten’s Case* stand at present, but also that if we were to alter them to give effect to the contentions of counsel we should be going further than interpreting

¹⁰⁰ *Haynes* (1859) 1 F. & F. 666.

¹⁰² *Thomas* (1911) 7 C. A. R. 36.

¹⁰⁴ *Holt* (1920) 15 C. A. R. 10.

¹⁰⁶ *True* (1922) 16 C. A. R. at p. 170.

¹⁰¹ *Burton* (1863) 3 F. & F. 772.

¹⁰³ *Pank* (1919) *Times*, 22 May.

¹⁰⁵ *Quarmby* (1921) 15 C. A. R. 163.

¹⁰⁷ *Kopsch* (1925) 19 C. A. R. at p. 51.

those Rules. We should also be expressing an opinion contrary to a great number of cases which have been decided by this Court.¹⁰⁸ There is also persuasive authority. Twenty-nine of the United States of America have rejected the irresistible impulse defence;¹⁰⁹ one State has not had occasion to consider it;¹¹⁰ one State has no legal test for insanity, but leaves it as a question of fact to the jury;¹¹¹ and there are scores of cases. The defence is not accepted in Canada; Riddell J. said: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.'¹¹² In a later case, the medical evidence was that accused was incurably insane, that he had known what he was doing and that the act was contrary to law, but he could not resist the impulse to kill: conviction was upheld.¹¹³ The New Zealand Courts refused the defence where accused 'had a fixed idea to kill his child, and an impulse to do so which he could not control.'¹¹⁴ The Irish Court of Criminal Appeal may have left the question open, but doubtfully, 'The English Court of Criminal Appeal to the contrary notwithstanding, that is not sufficient to rule it out of consideration, if it be shown to rest on any established principles of the criminal law. It is not ours to make laws. We have only to ascertain and declare the law as it is, whether, when ascertained, it is to be found to be in the circumstances of our day deserving of approval or otherwise. If otherwise, we have a legislature competent to alter or adapt it in the light of the latest science and of the conditions of the time in which we live.'¹¹⁵ An effort was made to induce the Judicial Committee of the Privy Council to admit the defence of irresistible impulse in a case from Victoria in 1936; but the Judicial Committee was not prepared to take a different view from that taken by the English Court of Criminal Appeal, for the adoption of the defence could not overrule these authorities, and it would only create different standards of law in England and the Dominions.¹¹⁶ The gist of most of these decisions is that irresistible impulse, at its most, is not more than evidence of insanity that might fall within the Rules in *McNaghten's Case*.

Next, we shall consider authoritative opinions favouring the adoption of the defence of irresistible impulse by judicial decision.

Sir James Stephen, in his study of 'Relation of Madness to Crime,'¹¹⁷ thought that the principles of the existing law were sufficiently wide to cover every case which ought to be covered—and he included irresistible impulse amongst desirable defences.¹¹⁸ Medical writers seem universally

¹⁰⁸ *Flavell* (1926) 19 C. A. R. at p. 143.

¹¹⁰ Rhode Island.

¹¹² *Creighton* (1909) 14 Can. Crim. C. 349.

¹¹³ *Jessamime* (1912) 32 C. L. T. 280.

¹¹⁴ *Deighton* (1900) 18 N. Z. L. R. 891.

¹¹⁵ *A.-G. v. O'Brien* [1936] I. R. 263.

¹¹⁶ *Sodeman* [1936] 2 All E. R. 1138; W. N. 190. For a full discussion, see Barry, *Insanity in the Criminal Law of Australia*; Can. Bar. Review, 427; or English Studies in Criminal Science Pamphlet, 8—12.

¹¹⁷ Stephen, II Hist. Cap. XIX.

¹¹⁸ Stephen, II Hist. 149; Stephen Digest, Art. 38.

¹⁰⁹ Weihofen, 32.

¹¹¹ New Hampshire.

to desire an extension of the law to adopt the defence.¹¹⁹ They do not take the remarks of the English Court of Criminal Appeal as final: 'where the judges, while avoiding a definite pronouncement on the admissibility of the doctrine of irresistible impulse, as not arising in the particular instance before them (*True's Case*), pointedly abstained from approving that doctrine.'¹²⁰ A recent case, tried at the Central Criminal Court in March, 1943, has caused medical men to believe that the question of irresistible impulse as a defence may have been reconsidered in a favourable direction.¹²¹

The basis of the defence is always mental disease, which impairs the power of volition: 'was by mental disease,' says the Report of 1923, and this requirement must never be overlooked.

The first practical example is probably *Hadfield's Case* in 1800.¹²² There was no doubt, from the evidence, that the accused knew what he was doing and knew that it was punishable by law.¹²³ Hadfield had a delusion, the act was done under its influence; and the jury found him insane. In 1840, Denman J. put the defence into words: "If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible."¹²⁴ Some time later, Martin B.: 'When such impulses come upon men, according to the medical evidence they were unable to resist them. It would be safe in such a case to acquit the accused on the ground of insanity.'¹²⁵ The defence was again admitted in 1883.¹²⁶ Later again, 'was the prisoner unable to control his actions in consequence of a disordered mind?'¹²⁷ In the next case, the motive would appear to have been revenge for fancied neglect; which is a very powerful motive with reckless sane people. There were four medical witnesses; and the jury were convinced that there was disease and irresistible impulse.¹²⁸ Later, Alverstone C.J. said the defence was not necessary in the case under appeal, but when the time came the Court would not hesitate to declare the law.¹²⁹ In an interesting case tried before Darling J., the medical evidence was that accused suffered from impulsive homicidal mania, which was very rare indeed, also from suicidal mania and claustrophobia. He knew the act he was doing and that it was wrong; 'but that owing to disease of the mind he was unable to control the homicidal impulse.' He was held to be insane.¹³⁰ In another case the medical evidence showed a change from cheerful to morose disposition, with complaints of pains in the head. Bray J., in summing-up, cited Sir James Stephen's opinion, and

¹¹⁹ Sullivan, *Crime and Insanity*, 229; East, *Forensic Psych.* 61; Noyer, *Text-book on Psychiatry*, 58; Mercier, *Crime and Insanity*, 240; 1 Taylor, 815.

¹²⁰ Sullivan, *Crime and Insanity*, 231.

¹²¹ *Lees-Smith* (1943) *Daily Telegraph*, 17 and 18 March.

¹²² 27 St. Tr. 1281.

¹²⁴ *Oxford* (1840) 9 C. & P. at p. 546.

¹²³ 67 Hansard, 719—20.

¹²⁵ *Jorden* (1872) 1 Taylor, 881.

¹²⁶ *Gill* (1883) *Oppenheimer, Criminal Responsibility*.

¹²⁷ *Duncan* (1890) *Renton, Law and Practice of Lunacy*, 908.

¹²⁸ *Prince* (1898) 1 Taylor, 881.

¹²⁹ *Jones* (1910) 4 C. A. R. at pp. 217—218.

¹³⁰ *Hay* (1911) 22 Cox, 268.

said, 'an actual disease of the mind such as to deprive him of the capacity of controlling his actions, in my opinion a jury should find him insane.'¹³¹ In summing-up in *True's Case*, McCardie J. said: 'Even if the prisoner knew the physical nature of the act, and that it was morally wrong and punishable by law, yet was he, through mental disease, deprived of the power of controlling his actions at the time? If "yes," then, in my view of the law, the verdict should be guilty but insane.' He warned the jury to apply the exemption, if it was one, with great care. The jury found accused guilty. This is an exceptional case, because four medical witnesses at the trial agreed that accused was certifiably insane. He was later certified insane after a statutory enquiry under sect. 2 (4) of the Criminal Lunatics Act, 1884.¹³² In 1936, the jury took matters into their own hands. They returned to Court, and asked, 'If Burton knew perfectly well what he was doing, but, owing to mental disturbance was totally unable to control his actions, would this be a case of manslaughter?' Finlay J. told them it would not; he cited decisions, and added that uncontrollable impulse had no place in our law; the question for the jury was 'guilty' or 'not guilty,' and, if 'guilty,' whether insanity was proved. The jury found the accused guilty, but insane.¹³³

In a later case, the jury have again apparently taken matters into their own hands. The accused was charged with the murder of his mother. He was a student, aged twenty-one. He was said to have been fond of his mother. He was deaf from an accident of childhood, and used ear-phones; he was of poor physique, and suffered from a congenital constitutional defect resulting in emotional immaturity and minor abnormalities of the central nervous system. Before committing the matricide, he had had four pints of beer. He seems to have asked his mother to give him some money, she refused, she was bending over a cash box, and he took up a knife and stabbed her. The medical evidence was definite that when he did the act he knew what he was doing, and that the act was wrong; the case was not, therefore, within the McNaghten Rules. Whilst awaiting trial, an encephalographic examination for the recording of waves emanating from the brain had been carried out by a psychiatrist, who concluded that there was disease of the brain, which caused it to function abnormally, and might have impaired judgment. In laboratory experiments, he had been given four pints of beer, which had the effect of lowering his blood sugar content, and it was proved thereby that he suffered from hypoglycæmia, which increased his brain abnormality, and caused him to be unable to control the impulse to kill. Asquith J. summed up on the McNaghten Rules, explaining them clearly to the jury, who, in spite of the summing-up, found the accused guilty, but insane.¹³⁴ A medical description of this type of reaction is available:

¹³¹ *Jolly* (1919) 83 J. P. 296.

¹³² *True* (1922) *Daily Telegraph*, 6 May; *Notable British Trials, The Trial of Ronald True*, 255; 16 C. A. R. at p. 165.

¹³³ *Burton* (1936) 100 J. P. 306.

¹³⁴ *Lees-Smith* (1943) *Daily Telegraph*, 17 and 18 March.

'the initial symptoms of a reaction are tremor, sweating, and a sensation of hunger, or a sinking feeling in the epigastrium. When the blood sugar falls there is probably increased activity of the suprarenals in an attempt to mobilise glucose from the tissues. This may readily produce the above symptoms as side effects. The patient also may become confused, agitated, noisy, hilarious or quarrelsome.'¹³⁵

In the United States of America the defence of irresistible impulse began to be discussed some time before *McNaghten's Case* was tried. In 1834 Wright J. said, 'If he had power to forbear or to do the act he is responsible.'¹³⁶ Then Birchard J., 'Was the accused a free agent in forming the purpose to kill?'¹³⁷ Shaw C.J. said, 'and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming force of mental disease, his intellectual power is for the time obliterated. . . .'¹³⁸ It is not very clear what the Chief Justice meant, and, according to the Report, the jury returned and asked him what degree of insanity would amount to a defence. In 1869, it was said, 'Man, under the influence of disease, may know the right, and yet be powerless to resist the wrong.'¹³⁹ By 1886, the defence was being more readily and clearly accepted. Somerville J., 'There must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (i) Capacity of intellectual discrimination; and (ii) Freedom of will.' 'There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid.'¹⁴⁰ These cases are but a few of many examples: in all, seventeen of the States of the United States of America have adopted the irresistible impulse defence.¹⁴¹

The law of South Africa (approved in the Report of the Committee on Insanity and Crime¹⁴²) was declared by Lord de Villiers: irresistible impulse is a defence if caused by mental disease, and it is a question of fact whether power of control has been lost.¹⁴³ The necessity for mental disease was emphasized later, 'an impulse which, by reason of mental disease, he is unable to resist.'¹⁴⁴

The Criminal Code of Queensland, 1899, s. 27 (quoted with approval by the Commission on Insanity and Crime¹⁴⁵), adopted the defence of irresistible impulse, 'or of capacity to control his actions.' This was adopted in the Western Australian Code: and, somewhat more elaborately, in the Code of Tasmania: 'When such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.' New South Wales, South

¹³⁵ Conybeare, *Text-book of Medicine*, 307. See also Hyslop, *The Borderland*, 28.

¹³⁶ *State v. Thompson* (1834) Wright's Ohio Reps. at p. 622.

¹³⁷ *Clark v. State* (1843) 12 Ohio, at p. 495.

¹³⁸ *Comm. v. Rogers* (1844) 7 Metc. (Mass.) 500.

¹³⁹ *Bradley v. State* (1869) 31 Ind. 492.

¹⁴⁰ *Parsons v. State* (1886) 31 Ala. 577.

¹⁴¹ Weihofen, 15.

¹⁴² *Hay* (1899) 16 Cape of Good Hope (S. C.) 290.

¹⁴⁴ *Smith* (1906) T. S. 783.

¹⁴² 1923, Cmd. 2005, p. 9.

¹⁴⁵ 1923, Cmd. 2005, p. 9; 24.

Australia, and Victoria, abide by the McNaghten Rules. An effort made in Victoria in 1936 to extend the Rules by judicial interpretation failed.¹⁴⁶ So, Australia splits on the irresistible impulse defence, three States each way.

The defence of irresistible impulse has made considerable headway in countries which have no connection with the McNaghten Rules. France, Penal Code, 1810, Art. 64: 'There is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act or if he was constrained by a force which he could not resist.' From the point of view of psychiatry, the words 'état de démence' seem rather wide. This criticism applies to the definitions of insanity in most Continental Codes. Germany, Criminal Code, 1871, s. 51: 'There is no punishable act if at the time of doing it the actor was in a state of unconsciousness or of morbid disturbance of the mental faculties which excluded free determination of the will.' Hungary, Criminal Code, 1878, s. 76: 'The act cannot be imputed to him who did it whilst in a state of unconsciousness or whose mental faculties were disturbed and who was thereby deprived of the faculty of determining his will.' Switzerland, Code, 1916, s. 12: 'is incapable of comprehending its wrongfulness, or of acting in accordance with such comprehension.' The Russian Imperial Criminal Code, 1903, s. 39: 'or control his actions.' The Penal Code of the Soviet Republic, 1926, Art. 11: 'Measures of social defence of a judicial-correctional character cannot be applied to persons who have committed crimes in a state of chronic mental disease or of temporary derangement of the mental faculties, or in any other condition of illness, if they were unable to realize the significance of their acts or to control them, or who, although they were in their right senses at the time of the act, have been attacked by mental disease before the passing of the sentence. To such persons measures of social defence of a medical character only can be applied.' This is a good example of co-operation between the lawyer and the doctor. Many medical men in England are irritated not so much by an insane person being convicted, as by their belief that punishment is not the best treatment for him.¹⁴⁷

It may be said in conclusion that the McNaghten Rules were not intended by the judges to be the last word on the law of insanity. True, they contain a great deal of new matter, for much of which there is no authority in earlier cases, or in any text-book, or statute: but no one recognized better than the judges themselves the limitations of their medical knowledge, the infinite variety of possible facts of cases, and the danger of impeding justice and handicapping judges by fixed rules: perhaps that is why the Answers were made as vague as they are. Sir James Stephen was convinced that the Courts could extend the Rules.¹⁴⁸

¹⁴⁶ See reference ¹¹⁶, above.

¹⁴⁷ They have not been brought up in the belief of Baron Bramwell in the effectiveness of punishment.

¹⁴⁸ Stephen, II Hist. 155.

Medical writers invariably look to the Courts reproachfully for not having done so.¹⁴⁹ Recognition of the defence of irresistible impulse has been held up in England by the aggressive attitude towards it of a few judges.¹⁵⁰ The main objection taken has been that the defence is difficult of proof or disproof; but it is really no more difficult than many questions which juries have to decide; and difficulty has never been a bar to litigation; why should it be to a criminal defence? Again, the remarks of these judges consist largely of very gloomy forebodings about the future of criminal law, and the safety of the community, if the defence is admitted; but they do not support them with any evidence that the defence has upset the administration of justice in any of the numerous jurisdictions which have adopted it: and it seems that no statistics have ever been published showing that the defence of irresistible impulse tends to interfere with the administration of justice in any of those jurisdictions.

Almost the only valid argument for leaving matters as they are is the very weak one that the existing safeguards for revision of convictions of persons suspected of being insane are such that no real danger exists of an insane person being hanged or otherwise punished. At one time there was a serious danger: for example, John Bellingham, who killed the Prime Minister, Spencer Perceval, was mad; yet he was hanged.¹⁵¹ There have been others, not so prominent.¹⁵² In modern times since the special power conferred on the Secretary of State under the Criminal Lunatics Act, 1884, s. 2 (4), and the power given to the Court of Criminal Appeal to substitute a verdict of guilty but insane under the Criminal Appeal Act, 1907, s. 5 (4), it is apt to be said that there is little danger of such injustice happening. It is also said that the exercise of the prerogative of mercy further lessens the danger. In the debate on Lord Darling's Bill in 1925, Lord Sumner observed that in some cases of conviction the exercise of the prerogative of mercy is as certain as that the sun will rise the next day. It seems unnecessarily antiquated, in a case of that nature, to have to use a procedure at the trial which makes it necessary to rely on the prerogative of mercy in order to get justice done and to bring legal recognition to certain forms of insanity.

And these safeguards do not eliminate all danger of injustice. A study of the first case in which the Court of Criminal Appeal substituted a verdict of guilty but insane emphasizes this danger.¹⁵³ There was no doubt that the accused was insane, yet he had been convicted: and he was very fortunate in having someone who was sufficiently interested in him to get the case taken to the Court of Appeal. It is unfortunate that a medical writer should be able to say, 'One case becomes a subject of prominent public interest, and every exertion is made . . . another

¹⁴⁹ 1 Taylor, 801; Sullivan, 231; 1 Wharton and Stillé, *Medical Jurisprudence*, 555.

¹⁵⁰ Notably Bramwell B. and Hewart L.C.J.

¹⁵¹ *Bellingham* (1812) 1 Collinson on Lunatics, 636. See also Ray, *Treatise on Medical Jurisprudence of Insanity*.

¹⁵² *E.g. Bowler* (1812) East, *Forensic Psychiatry*, 51; 1 Taylor, 804.

¹⁵³ *Jefferson* (1908) 1 C. A. R. 95.

case which excites no interest is left to itself; the accused is convicted, and is either executed or otherwise punished, although the evidence of insanity might in fact have been stronger in the latter than in the former instance.'¹⁵⁴ Another says, 'hardship has not resulted, because in suitable cases the law is not strictly applied':¹⁵⁵ better had he said that in an occasional case the law was not strictly applied because the accused had the fortune to be tried before a judge who had a dislike for the law's deficiencies.

This dislike now appears to have spread to juries, judging by the verdicts of guilty but insane, returned at the Central Criminal Court in 1936 and 1943,¹⁵⁵ in the face of the McNaghten Rules. If juries persist in recognizing the defence of irresistible impulse, the legislature or the Courts may be forced through pressure of public opinion to recognize it as well. Have the Courts the power to make a pronouncement in favour of the defence? The answer has been admirably suggested by two eminent judges, with reference to the very issue. Somerville J. has said, 'The enquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed.'¹⁵⁶ Evatt J. caps him with: 'It would be unsatisfactory if the common law of England, of which the rule in *McNaghten's Case* is a part, must be regarded as forever unable to adjust its rules to modern medical knowledge and science, and this merely as the result of a decision of a Divisional Court in England, the rulings of which are not considered necessarily authoritative by the House of Lords.'¹⁵⁷

¹⁵⁴ 1 Taylor, 821.

¹⁵⁶ *Parsons v. State* (1886) 81 Ala. 577.

¹⁵⁷ *Sodeman* (1936) 55 Comm. L. R. 192.

¹⁵⁵ See notes 133 and 134.

In Memoriam

PROFESSOR SIR WILLIAM HOLDSWORTH, O.M.

AFTER a long and painful illness, endured with unwavering fortitude, Sir William Holdsworth has passed from us. No teacher of law can have had a wider circle of friends in every branch of the legal profession, for his kindly disposition and ready accessibility to every one were as characteristic of him as were his great ability and boundless energy. His *History of English Law* is the greatest achievement of its kind since Pollock and Maitland's *History of English Law*. Those of us who have worked at this topic can especially appreciate the magnitude of the task that Sir William set for himself, and it is not too much to say that peculiar qualities were needed for its achievement. Any one who has written on the history of law knows how difficult it is to turn aside from the innumerable by-paths that branch off from the main road of this or that particular subject, and to call a halt to the collection of material. 'The historian essentially wants more documents than he can use.' Sir William solved the problem and gave Anglo-American lawyers a work that must form the starting-point of any research in the history of English law. We say deliberately 'the starting-point,' for the story of English law can never be complete until all the material for it is available in easily accessible form, and the accumulation of this goes on steadily through the labours of individual workers and of bodies like the Selden Society and other learned associations.

Primarily, Sir William's fame rests on his *History*, but he was interested in all the conspicuous problems of current law, as many an article from his pen proves. Like all true teachers of law, his generous encouragement of every honest effort of beginners in research was a great factor in carrying on traditions of which he himself was such an outstanding exponent.

P. H. W.

NOTES ON RECENT CASES

CRIMINAL LAW—LARCENY—LETTER MISTAKENLY DELIVERED TO ACCUSED, WHO FORMED INTENT TO STEAL CONTENTS WHEN HE OPENED ENVELOPE—HELD: LARCENY.

R. v. Hudson. [1943] 1 K. B. 458.

H received a letter, addressed to himself but intended for another. There was no evidence as to how long he kept the letter before opening it. On opening it he found inside a cheque, inadvertently made out in his own name, which he thereupon decided to appropriate.

It was held by the Court of Criminal Appeal that, although when he received the letter he had no *animus furandi* with regard to its contents, he had been properly convicted of larceny.

The Court, in giving judgment, referred to *R. v. Mucklow* (1827) 1 Mood. C. C. 160; *R. v. Davies* (1856) Dear. C. C. 640; *R. v. Ashwell* (1885) 16 Q. B. D. 190. *R. v. Davies* and *R. v. Mucklow* laid it down that when a person receives a letter and has no *animus furandi* at the time of so doing, he cannot be convicted of larceny if he subsequently appropriates the contents. The *animus furandi* must exist at the time of taking. In *R. v. Ashwell* the prosecutor handed the prisoner a sovereign, both parties believing it to be a shilling. On discovering the mistake, the prisoner appropriated the sovereign, and he was convicted of larceny. The appellate Court, being evenly divided, the conviction stood. In the above case, Cave J. said that possession was not a pure benefit; it may involve liabilities. Consequently, a man cannot be presumed to assent to possession. Actual consent must be shown. A man does not consent to that of which he is wholly ignorant, and so he does not get possession of the thing till he knows of its existence. The Court of Appeal followed *R. v. Ashwell* in the present case. The appellant did not know of the existence of the cheque till he had opened the envelope. At that moment he first got possession of the cheque and he thereupon resolved to appropriate it. The *animus furandi* thus existed at the moment of the taking. Thus the accused was guilty of larceny, and the appeal was dismissed.

The simple rule that *animus furandi* must exist at the moment of taking is not easy to apply because of the difficulty of deciding at what moment the technical possession shifted. The decision in this case in effect overrules *R. v. Mucklow* and *R. v. Davies*, and establishes the view taken in *R. v. Ashwell* that possession is not taken until the person knows what he has got.

D. C. H.

CRIMINAL LAW—MANSLAUGHTER—NEGLIGENCE OF MEDICAL PRACTITIONER—HIGH DEGREE NECESSARY—EVIDENCE OF OTHER CASES TO REBUT DEFENCE OF IDIOSYNCRACY IN RELATION TO DRUG.

Akerele v. The King. [1943] A. C. 255.

A, a duly qualified medical practitioner in Nigeria, in the course of his practice, treated for 'yaws' several patients (a number of them children) with Sobita, a drug. Consequently ten children died. A was charged with manslaughter in respect of one, whose death was due to 'stomatitis' by bismuth poisoning. The defence maintained idiosyncrasy on the part of the deceased to bismuth and an insufficient degree of negligence to ground criminal liability on the part of A. The Crown tendered evidence showing the symptoms, illness, and death of nine other children. A was

convicted and appealed to the Judicial Committee of the Privy Council, who allowed the appeal. The judgment in the first place approved the admissibility of the evidence of the symptoms, illness and death of the nine other children. An overdose might be administered in one of two ways, either by injecting too much of a proper mixture, or the right quantity of an improper preparation. In the former case such evidence would be inadmissible, as negligence in injecting too much of a proper mixture into one person does not necessitate or imply a repetition in injecting another; but here it was the latter case. In the second place, their Lordships had to decide whether the degree of negligence was 'gross' enough to be criminal. Negligence in this case consisted in the administration of a dangerously strong mixture. The trial judge nowhere stated in what the negligence consisted, and seemed to impute a fresh negligence in the case of each death. His citations in respect of the law of criminal negligence from *R. v. Bateman* (1925) 94 L. J. (K. B.) 791, were approved (a higher degree of negligence is requisite in liability for homicide than in civil liability). But their Lordships did not think that merely because too strong a mixture was once dispensed and a number of persons made gravely ill, a criminal degree of negligence was proved. In granting leave to appeal their Lordships did not deviate from the principle that they will not allow an appeal in a criminal matter unless 'injustice of a serious and substantial character has occurred,' for in the present case, the distinction between civil and criminal liability had been inexactly drawn, the ground on which a criminal charge is based ill-defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death. It appears that in the case of professional men the degree of negligence requisite for criminal liability is very great for offences committed in the pursuance of their profession.

O. R. M.

CONTRACT—HIRE OF A VAN AND DRIVER FOR DELIVERY OF GOODS—INTERPRETATION OF CLAUSE IN CONTRACT EXEMPTING PERSON LETTING VAN AND DRIVER FROM LIABILITY FOR LOSS OF GOODS WHILST ON THE VAN.

Bontex Knitting Works, Ltd. v. St. John's Garage. [1943] 2 All E. R. 691.

The plaintiffs, having been told that the defendants' insurance covered an employee of the plaintiffs, and having been informed that it was a term of the condition of hire that the defendants would not be liable for loss or damage to the goods carried, hired from the defendants (who were not common carriers) a van and driver to deliver goods to their customers.

The driver, while on a journey with the goods, left the van, because he wanted an extra meal, having taken out the ignition key as the only precaution against theft. During his absence for about an hour the van and goods were stolen.

The plaintiffs brought an action to recover damages for the goods lost; they asserted that the defendants were liable in tort for negligence, and that they were also liable for breach of contract.

Lewis J. applying *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* [1942] A. C. 509, and 'the test of control,' came to the conclusion that the driver was the servant of the defendants—and so his negligence was that of the defendants. He held that the driver was negligent; but that the exemption clause in the contract excluded defendants' liability in tort. He held, however, that leaving the van for so long—one hour out of a period of two and a half-hours for the journey—constituted a breach of contract to deliver forthwith and to deliver immediately.

The defendants submitted that the clause of the contract absolving them from liability was a good defence—but it was held on the authority of *Lilley v. Doubleday*

(1881) 7 Q. B. D. 510, and *The Cap Palos* [1921] P. 458, that this clause was good only so long as the contract was in existence: and as the defendants had broken the contract through their servant, they could not rely on the clause. Judgment for plaintiffs.

The breach of contract rendered the saving clause inapplicable, and thereby brought the case within the principles of the cases cited in judgment. But for the breach, it is doubtful whether the plaintiffs could have recovered.

R. L. S.

CONTRACT—OFFER AND ACCEPTANCE—COUNTER-OFFER SUBJECT TO 'WAR CLAUSE'
HELD TO BE TOO VAGUE TO CREATE CONSENSUS AD IDEM.

Bishop & Baxter, Ltd. v. Anglo-Eastern, &c. Co., Ltd. [1944] 1 K. B. 12.

The A Co. wrote to the B Co., ordering 20,000 cardigans at a fixed price. B & Co. replied accepting 'subject to the necessary licences, &c. being in order and subject to government restrictions as to sales and war clause.' After some of the cardigans had been delivered and accepted by A & Co., B & Co. repudiated the agreement. B & Co. sued for the price of cardigans that had been delivered. A & Co. counter-claimed damages for breach of contract. B & Co. denied that there was a contract. Atkinson J. held that A & Co. could recover damages for breach of contract, but the Court of Appeal, whose judgment was delivered by Scott L.J., allowed the appeal.

Though purporting to be an order, the letter of A Co. was construed as an offer; the letter of B Co. was construed, not as an acceptance of the offer, but as a counter-offer. *Primâ facie* A Co. had tacitly accepted this counter-offer by accepting those cardigans which were delivered, but the question was raised whether acceptance of this counter-offer could create a binding contract, since the words 'and war clause' in it were so vague.

A Co. put forward two arguments—(1) The words 'and war clause,' were mere surplusage, and B & Co.'s stipulation should be read 'and war conditions' or 'war contingencies.' It was apparently on this ground that Atkinson J. gave judgment for the respondents. But the Court of Appeal regarded the word 'clause' as too unambiguous to be considered unimportant. The manager of B Co. 'asked for a war clause; and we have to construe his letter. War clauses take many forms, and the protection afforded to a seller by one may differ from that given by another. Until the parties had met and agreed on a particular form and content of a war clause, there was and could be no *consensus ad idem*' (at p. 14). Therefore there was no contract. (2) The fact that both parties thought a contract existed entitled the judge to hold that a contract did exist. But the Court of Appeal held that the erroneous legal views of the parties did not alter the legal interpretation of the written words.

This case establishes no new principle of law. The second argument was so weak that it needs no further consideration. As to the first part of the decision, the Court of Appeal was merely following the House of Lords' decision on similar facts in *Love & Stewart, Ltd. v. Instone, Ltd.* (1917) 33 T. L. R. 475. The present case merely re-affirms the principle, now well established, that there can be no binding agreement unless its terms are either certain or can be rendered certain by application of the maxim *certum est quod certum reddi potest*.

J. A. H.

CONTRACT—SUPPLY OF DENTURES—SALE OF GOODS OR SUPPLY OF WORK AND MATERIALS—IMPLIED TERM OF FITNESS FOR PURPOSE.

Samuels v. Davis. [1943] 1 K. B. 526.

The plaintiff, a dentist, entered into a contract to make a set of dentures for the defendant's wife. In an action for the price it was held by the Court of Appeal that, whether the contract was for the sale of goods or for work done and materials supplied, there had been a breach of an implied condition that the dentures should be reasonably fit for the purpose intended, and that the defendant was entitled to succeed.

The implication of such a term was not a question of the legal classification of the contract, and it was therefore a matter of 'legal indifference' whether it was for the sale of goods (in which case it was argued that the point was covered by sect. 14 of the Sale of Goods Act, 1893) or for work and materials. Du Parcq L.J. (at p. 529) adopted Kelly C.B.'s statement of the law in *Francis v. Cockrell* (1870) L. R. 5 Q. B. 501, 503, '... as a general proposition of law, ... where one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied.' The Court of Appeal had no doubt that the efficacy of such a term depended on the reasonable co-operation of the person relying on it, and that failure in this respect would, if proved, entitle the plaintiff to repudiate the contract and sue for damages; but here no lack of such co-operation was alleged. It should be noted that in this case, the husband did not dispute liability on the ground that the contract was with the wife.

It is to be regretted that the Court found it unnecessary to distinguish between a contract of sale and one for work and materials; Scott L.J. refused to be committed, and du Parcq L.J. confined himself to the bare suggestion that it was a contract of sale (at p. 528). It is suggested in view of the uncertainty still prevailing in this branch of the law, that the solution adopted by the American Uniform Sales Act deserved consideration: that goods are the subject of a contract for work and materials if they are not suitable for sale to others in the ordinary course of the seller's business. Its merits as a practical test are particularly demonstrated by the circumstances of this case.

L. J. D.

LEASE—ASSIGNMENT—COVENANTS BY SUCCESSIVE ASSIGNEES DIRECTLY WITH LESSOR TO PAY RENT FOR RESIDUE OF TERM—ASSIGNEE IN POSSESSION DEFAULTS—HELD: EACH EARLIER ASSIGNEE WAS LIABLE FOR ARREARS.

J. Lyons & Co., Ltd. v. Knowles. [1943] 1 K. B. 366.

Plaintiffs leased premises to W for a term to expire in 1976. W covenanted not to assign without the lessor's written consent and also that every assignment should contain covenants by the assignee direct with the lessors to observe the conditions and covenants in the lease, and further not to assign without the lessor's consent and in case of assignment to pay the several rents reserved. W with permission assigned to K. The deed of licence to which the lessors were parties contained covenants by K that he would during the residue of the term granted by the lease, pay the rent reserved and observe the conditions and covenants of the lessee as contained in the lease. K assigned the residue of the term to G under a

deed which contained an identical covenant by G. G defaulted and plaintiffs sued K.

Plaintiffs maintained that K covenanted to remain liable for the whole residue of the lease, irrespective of reassignment. K contended that in the licence whereunder he assigned to the company there was an implied release from the moment of the second assignment and that the second assignment amounted to a novation impliedly making G liable and absolving the defendant.

Asquith J. gave judgment for the plaintiffs, holding that the covenant bound each and all the successive assigns for the whole residue of the term. The Court of Appeal affirmed his decision. Lord Greene M.R. declared that he was unable to follow the argument that on its true construction the covenant entered into by the defendant did not extend the whole term. As to the implied novation, nothing could be 'more cogently opposed to any inference of novation than the fact that the parties chose to put their contractual intentions into a formal document which expresses not the slightest intention to novate, a matter of such importance that they would be expected to include it in the document and not to leave it to be inferred from conduct or circumstances' (p. 369).

O. L. P.

LEASE—INABILITY TO FULFIL COVENANTS OWING TO WAR CONDITIONS—DEFENCE OF FRUSTRATION HELD INAPPLICABLE.

Leighton's Investment Trust, Ltd. v. Cricklewood Property and Investment Trust, Ltd.
[1943] 1 K. B. 493.

In 1936, two plots of land were demised to lessees, C, Ltd., by a building lease for ninety-nine years, in which they covenanted to build a specified number of shops on the land within a certain time. On a claim by the lessors for payment of ground rents under the lease, the lessees repudiated liability, asserting that that obligation had been excused or discharged by frustration occasioned by the war, which had caused a virtual cessation of private building. The sole issue before the Court was whether the doctrine of frustration applied to a building lease such as that involved.

Asquith J. held that the doctrine was not applicable in such a case. The Court of Appeal upheld the decision. Asquith J. said that the doctrine of frustration has no application to an ordinary lease, as was decisively shown in *Matthey v. Curling* [1922] 2 A. C. 180, 200, and other cases, all of which had been reviewed by Birkett J. in *Swift v. MacBean* [1942] 1 K. B. 375, and of which Asquith J. said: 'The *ratio decidendi* of these decisions is plain. A contract may be frustrated, but a demise is more than a contract. . . . It transfers proprietary as well as personal rights. This seems to me just as true of a building lease as of any other kind of lease' (p. 495).

It was strongly argued for the defendants that the building lease was a mere incident of a broad commercial undertaking capable of frustration. In reply to this argument the learned judge said (at p. 495) that, whatever the ulterior objects of the instrument concerned, it remained a lease, and therefore fell within the established principles of property law. In the Court of Appeal, MacKinnon L.J., reading the brief judgment of the Court, approved the decisions cited by Asquith J., and said: 'The doctrine of frustration . . . has never been applied to a demise of real property. Indeed, there is clear authority that it cannot be so applied' (p. 496).

The consistency of the law on this point has thus been maintained. But perhaps even more important is the illustration provided by the case of the desire felt by the Courts to keep the doctrine of frustration within limits. As Lord Sumner said in *Bank Line v. Capel* [1919] A. C. 435, 459, 'the doctrine is one which ought not to be extended.'

H. E. W. H.

TORT—ANIMALS—INJURY CAUSED BY CATTLE STRAYING TO THE HIGHWAY—HELD, ON THE FACTS, THERE WAS NO NEGLIGENCE.

Hughes v. Williams. [1943] 1 K. B. 574.

During the hours of darkness, a farm hand in the employment of B, the defendant, led two horses from the stable into the yard, both stable and yard being on B's land. He did not know that a gate, which was usually closed, was open that night, having been opened by an unidentified person. The horses passed through this gate to the highway, where they came into collision with the car of A, the plaintiff. A sued B for negligence. *Held*, by the Court of Appeal, B was not liable.

It was argued for A, that the rule of law, that there is no duty on the owner or occupier of land adjoining the highway to prevent animals on it from escaping to the highway (laid down in *Heath's Garage, Ltd. v. Hodges* [1916] 2 K. B. 370, and stated by Lord Wright in *Brackenborough v. Spalding U. D. C.* [1942] A. C. 310, 321), was of doubtful validity, and in any event should be restricted to harmless animals like sheep.

Lord Greene M.R. considered himself bound by the rule stated above. After severely criticizing this rule the learned M.R. said he could see no reason for a distinction between pasturing animals in a field, and dealing with them in an enclosed yard, the possibility of which had been suggested by the plaintiff. He held there was no evidence of negligence, and followed Vaughan Williams and Kennedy L.JJ. in *Ellis v. Banyard* (1912) 106 L. T. 51, without, however, committing himself to the view that nothing short of deliberately opening the gate could amount to such negligence.

MacKinnon and Goddard L.JJ. concurred, both in the judgment and in the criticism of the rule of law in question. Goddard L.J. also expressed the opinion that as there was no duty on the defendant to fence, there could be no duty on him to keep a gate (which was part of a fence) shut.

The Court of Appeal regarded themselves as bound by previous authority. They certainly rendered a great public service in drawing attention to the unsatisfactory state of the law on this particular subject, but, on the other hand, by unhesitatingly accepting the rule in question as law, the decision will disappoint those who had believed it to be of such doubtful validity, and uncertain extent, as to be capable of being interpreted restrictively, if not disregarded, by the Court of Appeal. The Court's refusal to differentiate between open country and enclosed premises in the application of the rule, will also be regretted by some.

A. P. H.

TORT—DANGEROUS STRUCTURE—LIABILITY OF SHIPBUILDERS AND INDEPENDENT CONTRACTORS—CONTROL AS TEST OF OCCUPATION.

Duncan v. Cammell Laird & Co., Ltd.; Craven v. Same.; Duncan v. Wailes Dove Bitumastic Co., Ltd.; Craven v. Same. [1943] 2 All E. R. 621.

Plaintiffs, the widows of two men, employees of C & Co. and a firm of sub-contractors respectively, who were drowned in the 'Thetis' submarine disaster, sued C & Co., the builders, and another firm of sub-contractors, the B Co. Careless painting of a torpedo-tube by the latter, unnoticed by C & Co. and the Admiralty examiners, had caused the accident. *Held*, by Wrottesley J., the B Co. were not liable, but C & Co. were liable.

As to the B Co., since a torpedo-tube is not dangerous *per se*, Wrottesley J. selected the 'neighbour' test (*Donoghue v. Stevenson* [1932] A. C. 562, 580), as the criterion of liability, but held that the opportunity of intermediate examination

by the Admiralty negated liability. Although they had carelessly rendered dangerous an otherwise harmless thing, they were unaware of the defect themselves, and could not be held liable because a reasonable man would not have perceived the danger. This suggests that the duty concerning dangerous things is an aspect of negligence, and not 'strict.'

As to C & Co., the opportunity of intermediate examination was no defence, for by contract with the Admiralty they remained responsible throughout the trials. Replying to the plaintiffs' contention that the sailors were the defendants' invitees, it was urged that defendants were not occupying the 'Thetis' during the trials. But the essence of occupation was held to be control in that 'it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises' (p. 627). Until the 'Thetis' cast off, C & Co. remained in such control. The argument that the invitation did not extend to the diving trial was rejected, since the torpedo-tube, being constantly submerged, was dangerous before the diving, and an invitation aboard a submarine 'fit for use' covered the diving. Their personal negligence also excluded the defence of common employment. Finally, *Haseldine v. Daw* [1941] 2 K. B. 343, where a landlord, ignorant of hydraulics, was held not liable for the default of competent hydraulic engineers, was distinguished on the ground that the position of C & Co. with respect to the submarine was not like that of a landlord with respect to a flat.

The interesting point is the extension of 'occupation' through the notion of control. The quotation also suggests that the duty towards invitees is to remove or notify existing dangers, rather than make the premises reasonably safe.

R. W. M. D.

TORT—DEFAMATION—LETTER TO PAPER BEARING FICTITIOUS ADDRESS—DEFENCE OF FAIR COMMENT OPEN TO NEWSPAPER.

Lyon v. Daily Telegraph, Ltd. [1943] 1 K. B. 746.

Under the generic title of 'flabby amusement,' the defendants published a letter commenting unfavourably on a radio programme conducted by the plaintiffs. The letter, which was found to be defamatory, did not exceed the limits of fair criticism. But, although it purported to come from a parson, the address was found to be fictitious, and the writer's name did not appear in Crockford's Clerical Directory. None of these latter facts was known to the defendants at the time of publication.

Hilbery J. held that the plea of fair comment failed on the ground that there was no evidence that the writer honestly held the views expressed; and that the fact that a fictitious address was used was sufficient evidence that the writer was not prompted wholly by conscience.

The decision was reversed by the Court of Appeal. Scott L.J. held: (1) There was no general rule of law making it the duty of every newspaper to verify the signature and address of a letter writer before publishing it. (2) Where it was proved that the writer of a letter was actuated by malice, it did not necessarily follow that, if made a co-defendant, the newspaper would lose the right to plead fair comment. In any case, it did not follow that the newspaper would lose its right if the writer were not made a co-defendant. (3) There was no general rule of law requiring a newspaper to prove the innocent state of mind of a letter writer. (4) Fairness and carefulness are two different legal and moral qualities; while malice or indirect motive may destroy the fairness of an apparently fair comment, negligence does not. Goddard L.J. held that the mere fact that the writer used a fictitious address was not sufficient evidence of malice on his part.

The Court was indeed right in reversing Hilbery's decision. For, as Goddard L.J. pointed out, anonymity is insufficient proof that a writer is actuated by malice. However, the case has thrown very little light upon the statement of Collins M.R. in *Thomas v. Bradbury* [1906] 2 K. B. at p. 642: 'Comment distorted by malice cannot be fair on the part of the person who makes it.' Whether this means that a newspaper publishing a letter cannot plead fair comment if it is shown that the writer was actuated by malice, still remains open. Nor is the matter clarified by discussing the purely procedural question whether the writer is made a co-defendant or not.

P. I. B.

TORT—MASTER AND SERVANT—COMMON EMPLOYMENT—CHILD INVITED TO ASSIST IN WORK INJURED BY NEGLIGENCE OF AN EMPLOYEE—HELD: COMMON EMPLOYMENT DID NOT APPLY.

Holdman v. Hamlyn. [1943] 1 K. B. 664.

This was an action by a boy, aged ten years, against a farmer for damages for negligence on the part of the farmer's son. The boy was on a lawful visit to the farm. The defendant's son, aged twenty-two, was operating a threshing machine, and thinking the boy would get into mischief if left to himself, invited him to go to the top of the stack of grain and pass down the sheaves. After some time the defendant's son told the boy to get down by a ladder, and, while he went and stopped the machine, the boy stepped off the stack on to the platform from which the defendant's son had been feeding the machine. He saw a sheaf of corn lying there, and pushed it into the machine with his foot, which was drawn into the aperture with the result that his leg had to be amputated.

Croom-Johnson J. found that the defendant's son was negligent, and held that the doctrine of common employment did not apply, and that the defendant was liable.

The Court of Appeal affirmed the decision, and held that the defence of common employment was not available. The true rule of the doctrine of common employment is that a worker, paid or unpaid, who has agreed to serve a master is to be deemed to have undertaken the risk of the negligence of those working with him in that service, provided that neither the terms of the express contract, if any, nor the facts of the particular case exclude the possibility of implying such an undertaking. Where the worker is a young child, as in this case, incapable of taking care of himself, such an undertaking cannot possibly be implied. Even if this implication could be made, the defendant would have had the further difficulty of showing that the contract as a whole was for the child's benefit, which it was clearly not. *Degg v. Midland Ry.* (1857) 1 H. & N. 773; *Potter v. Faulkner* (1861) 1 B. & S. 800, and *Bass v. Hendon U. D. C.* (1912) 28 T. L. R. 317, were distinguished on the ground that in those cases the plaintiff was a trespasser, whereas in this case the plaintiff was an invitee.

B. M.

TORT—MASTER AND SERVANT—COMMON EMPLOYMENT—TEST FOR DETERMINING EXTENT OF MASTER'S DUTY TO PROVIDE SAFE SYSTEM OF WORKING.

Speed v. Thomas Swift & Co., Ltd. [1943] 1 K. B. 557.

The plaintiff, a dock labourer employed by the defendants, was injured while loading a ship from a barge alongside. There were features of special danger. As a result of damage by collision, the starboard rail was broken and had not been

removed or protected, and the port winch was defective and difficult to control. Owing to a hook catching in the rail, either the rail or a piece of timber lying on the deck near it fell on to the plaintiff, who alleged that the accident was due to the failure to provide a safe and proper system of working by not removing or protecting the rail, and by leaving timber near it.

The defendants contended that the rail was not usually removed or protected when 'married gear,' by which port and starboard winches were worked together, was being used; that the accident was due to the failure of a fellow-servant of the plaintiff to carry out the system properly, and that they were exonerated from liability by the doctrine of common employment.

The Court of Appeal held that in view of the special circumstances the section of rail ought to have been removed or so protected that no hook would catch in it, and that therefore the employers had failed to provide a safe and proper system of working adapted to the circumstances. Lord Greene M.R. held that the provision of a safe system of working includes the issue of special instructions in special circumstances.

Where work is regular and uniform, it is reasonably simple to distinguish whether an accident was due to a faulty system of working or to negligence on the part of an employee. But where the system of working must vary with the circumstances of each case, the distinction becomes more difficult, as Lord Wright pointed out in *Wilsons & Clyde Coal Co. v. English* [1938] A. C. 57. The theory of liability is that the employer lays down the general system of working and is liable for defects in it, but in practice the modern employer is a company with a hierarchy of officials and it is often difficult to say whether negligence proved is that of the employer in not providing a safe system of working or that of a servant in failing to carry out that system. Lord Greene M.R. considered that 'system' might include according to circumstances, such matters as 'the physical lay-out of the job, . . . the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions' (p. 563).

J. C. F. P.

TORT—NEGLIGENCE—CHILDREN IN SHOP INJURED BY UPSETTING OF TEA-URN
CARRIED THROUGH WITH LEAVE OF MANAGERESS—OWNERS OF SHOP NOT LIABLE.

Glasgow Corporation v. Muir and Others. [1943] A. C. 448.

The manageress of the appellants' tearoom and sweet-shop permitted a picnic party to bring their tea into the tearoom and consume it there. The way to the tearoom led through a narrow space bounded on one side by the sweet counter. A number of children were being served by the manageress at this counter, when two members of the picnic party carried in their urn. For a reason which was not explained, one of these two released his grip, and a quantity of tea was spilt. Several of the children were scalded.

An action brought on behalf of the children against the appellants for the alleged negligence of their manageress failed in the Outer House, but succeeded on appeal to the Inner House of the Court of Session. The House of Lords reversed the decision of the Inner House and restored that of the Lord Ordinary.

The dispute concerned the extent of the duty of care owed by the manageress to the children. The majority of the Inner House apparently held that the manageress should have removed the children. Lord Carmont, indeed, considered that if she could have foreseen any likelihood of their being injured by the importation of the urn, then the appellants were liable, whatever the immediate cause of the accident. The House of Lords disagreed with all this. Carriage of the urn was not intrinsically a dangerous operation, and if the Inner House were right the appellants would in effect be made insurers of the children. The respondents could succeed only if they

proved that there had materialised a risk which the manageress ought to have foreseen. It could not be said that she ought to have foreseen an occurrence the cause of which was unascertained.

The case is one of the few in which Latin tags about causation are helpful. The Inner House, in effect, held that the cause of the accident was breach of an alleged duty to remove the children. Lord Romer pointed out that, even if such a duty had existed, its breach would have been only a *causa sine qua non*. The *causa causans* was the unascertained event which caused one bearer to release the urn.

S. F. C. M.

TORT—NEGLIGENCE—SALE OF BOW AND ARROW TO BOY—INJURY TO SCHOOLFELLOW IN PLAYGROUND—HELD: SUPERVISION ADEQUATE THOUGH NOT CONTINUOUS; BOW AND ARROW NOT CHATTEL INHERENTLY DANGEROUS.

Ricketts v. Erith B. C. [1943] 2 All E. R. 629.

In the midday break, a schoolboy aged ten left the playground by the normal entrance, and bought a bamboo bow and arrow from X's shop. On his return, and unseen by the teacher on duty, he discharged the arrow close to a child aged six. It fractured her glasses; a splinter entered one eye, which had to be removed. In an action brought by her father as her next friend, Tucker J. held: (1) the education authority was not negligent in failing to provide adequate supervision, for, in the circumstances, the degree of care incumbent on the staff was that of reasonably careful parents with a large family. This standard was reached if a teacher occasionally visited the playground, there being no continuous supervision. (2) The bow and arrow were not inherently dangerous, and there was thus no duty of care on the seller either towards the boy or the public in general.

What is the test for deciding whether an article is inherently dangerous? In *Burfitt v. Kille* [1939] 2 K. B. 743, Atkinson J. held a pistol used for firing blanks to be, on the facts, a chattel dangerous *per se*. Had there been no defect in the pistol, it may be doubted whether this toy is any more dangerous than the bamboo bow and arrow. If David could kill Goliath with a stone and a sling, what might a budding Robin Hood not do in a school playground? 'I do not understand,' said Scrutton L.J. in *Hodges v. Anglo-American Oil Co.* (1922) Lloyd's List L. R. 183, at p. 187, 'the difference between a thing dangerous in itself, as a poison, and a thing not dangerous as a class'; and Tucker J., in this very case, pointed out that any article is liable to become dangerous in the hands of children.

The adequacy of supervision in schools depends always on the special circumstances, but the Courts are loth to interpret this duty too strictly: *Camkin v. Bishop* (1941) 2 All E. R. 713.

E. S.

TORT—NUISANCE—DEFENDANTS HELD LIABLE FOR ACCIDENT CAUSED BY LEAVING UNLIGHTED MOTOR VEHICLE LEFT ON ROAD IN DARKNESS.

Ware v. Garston Haulage Co., Ltd. [1944] 1 K. B. 30.

A motor lorry and trailer belonging to the defendants broke down on the highway. The men in charge, who had failed to effect repairs before darkness fell, left the vehicle unattended in order to obtain hurricane lamps. They had tested the lights on the vehicle both in daylight and after dark, and assumed that the rear light was working efficiently. However, it was found as a fact that the rear light was out when, shortly after the men had departed, the plaintiff's motor cycle collided with the trailer. The plaintiff was fatally injured.

Held, by the Court of Appeal, that the question of negligence was immaterial, because the unlighted lorry on the highway after dark constituted a nuisance, and

that the plaintiff was entitled to recover on that ground alone. Lewis J., in the Court below, had found the defendants guilty of negligence in failing to make sure that the lamp was burning and would continue to burn. In the Court of Appeal, the defendants argued that they had taken all reasonable care in the circumstances, that there was no evidence of negligence, and that the decision of Lewis J. should be reversed; but Scott L.J. (in whose judgment both the other L.JJ. concurred) held that the mere presence of an unlighted vehicle on the highway at night constituted *prima facie* a nuisance. The presence of such an obstruction imposed an absolute liability on the defendants to see that it was properly lighted. Their failure to do so rendered them liable.

The case is interesting in that, once again, a clear distinction is made between 'reasonable care' in Nuisance and Negligence. The mere exercise of reasonable care by the defendant in regard to the nuisance under his control is insufficient if damage accrues to the plaintiff because of it. It is respectfully submitted, however, that Scott L.J.'s use of the phrase 'absolute liability' is unfortunate. Absolute liability in these circumstances would mean that the defendants would have been liable for the acts of a trespasser committed without being reasonably within their knowledge. Such a conclusion is inconsistent with the decision of H.L. in *Sedleigh-Denfield v. O'Callaghan* [1940] A. C. 880.

R. R. F.

TORT—SEDUCTION—PROOF OF RAPE HELD NO BAR TO ACTION FOR LOSS OF SERVICE,
BUT ACTION FAILED BECAUSE EVIDENCE OF GIRL UNCORROBORATED.

Mattouk v. Massad. [1943] A. C. 588.

M, fifteen year old daughter of X, the appellant, alleged that on two occasions the respondent had intercourse with her against her will. She maintained that, as a result of the second intercourse, she gave birth to a child; it was for the expenses and loss of service consequent on the birth that X claimed damages.

The trial judge, disregarding the lack of corroborating evidence and the palpable untruth of the major portion of the girl's story, granted £2,000 damages to X. The West African Court of Appeal unanimously reversed this decision, finding that the girl's allegations were wholly incredible. X appealed to the Judicial Committee of the Privy Council, which dismissed the appeal. Lord Atkin, in delivering the judgment of their Lordships, emphasized the improbability of the girl's account of the events. Their Lordships were of opinion that the Court of Appeal was perfectly justified in refusing to accept the unsupported and extremely dubious evidence of the child. Turning to the point of law involved, Lord Atkin stated that both the trial judge and the Court of Appeal appeared to have inclined to the view that proof of rape would not support an action for seduction. However, he pointed out that 'the father's or master's cause of action is for the loss of the girl's service, and it seems illogical in the extreme to suppose that he could recover if the girl yielded, but not recover, if he lost the service, because the girl was forced.' He treated as immaterial the fact that rape was a felony, and in support of this quoted *Osborn v. Gillett* (1873) L. R. 8 Ex. 88, where it was decided that the fact that the wrong done to the servant was a felony, had no bearing on the master's cause of action. The damage done to the master, he maintained, was the same, whether she was seduced or raped.

This case clearly indicates that corroboration of the plaintiff's story, especially if she is a child, is almost certainly necessary in cases of seduction and rape; and further, though this was not necessary for the decision, that proof of rape is not inconsistent with an action in tort for seduction.

I. M. S.

BOOK REVIEWS

The International Law of the Sea. By A. PEARCE HIGGINS and C. JOHN COLOMBOS. Longmans. 1943. 647 pp. (42s.)

The late Professor Pearce Higgins had made the province of maritime law one particularly his own, both with regard to the law of peace and war. International lawyers will, therefore, welcome the fact that his unfinished work on the subject has been taken up by a devoted friend and pupil and brought to completion. Dr. Colombos, whose treatise on Prize Law has acquired a deservedly fine reputation on account of its precision and lucidity, has also written on various aspects of the law of the sea in time of peace, and there is every reason for assuming a true partnership in the production of the book as a whole. It appears that while Dr. Colombos has devoted special attention to the modern developments, Professor Pearce Higgins was largely responsible for the historical aspects of the book. These are a conspicuous and valuable feature of the volume as the reader may see, for instance, from the treatment of the question of piracy in relation to unrecognized insurgents.

The book will be particularly useful to the practitioner and to institutions and offices directly concerned with maritime matters. On the whole, the authors have avoided theoretical discussion, and it is only by way of exception that the book is likely to give rise to controversy. This applies, for instance, to the view that recent events may have rendered obsolete the objections to constructing the Channel Tunnel between this country and France (Dr. Colombos, it will be noted, is the author of a monograph entitled 'Le tunnel sous le manche et le droit international'). The opinion that 'the new methods of warfare have made the narrow sea-channel between England and France particularly vulnerable to intensive attack on shipping both by aircraft and submarines, so that an undersea communication would offer an alternative and, at the same time, a more protected means of transport,' seems to simplify unduly a difficult problem. In presenting the recent developments Dr. Colombos quotes, as a rule, official documents and sources. It is to be hoped that in the next edition he will supplement his presentation of the navicert system by an account of the important retaliatory Order in Council of July 31st, 1940, which introduced, with all requisite clarity, the distinction between ship navicerts, cargo navicerts, and certificates of origin and interest, and which, generally, placed the measures of economic warfare on a comprehensive basis. The last chapter on the Covenant of the League of Nations, the Kellogg-Briand Pact, and the future of international organization is hardly germane to the subject-matter of the treatise and might be with advantage omitted from the next edition which, in view of the excellence of the book, is to be expected with some confidence before long.

H. L.

The Judicial Function in Federal Administrative Agencies. By JOSEPH P. CHAMBERLAIN, NOEL T. DOWLING and PAUL R. HAYS. New York: Commonwealth Fund; Oxford University Press (Sir Humphrey Milford). 1942. xii and 234 and (index) 24 pp. (\$3; 16s. 6d. net.)

This book is an analysis of administrative procedure illustrated by cross-sections of the activities of various federal agencies. For their facts the authors naturally draw on the detailed studies already published by the Commonwealth Fund, such as Sharfman on *The Interstate Commerce Commission*, and also on the new store of material provided by the investigations of the staff attached to the Attorney-General's Committee which reported on Administrative Procedure in 1941. So far

as general principles are concerned the authors would be the first to acknowledge their indebtedness to Ernst Freund's *Administrative Powers over Persons and Property* and to *The Administrative Process* by Dean Landis. In addition to this comparative account of the stages by which the agencies under review enforce the policy prescribed by Congress, either informally or by instituting judicial proceedings, the book also contains a valuable analysis of the types of sanctions employed.

An English reader might expect the book to deal with that part of the administrative process when a *lis inter partes* has arisen, a subject which centres round *Local Government Board v. Arlidge* and the spate of cases on 'natural justice' in the nineteen-thirties, but the authors make it cover practically the whole sphere as they define the judicial process in this connection as consisting—

'of finding the facts upon which action shall be based, determining the law which shall govern the action, and deciding the case according to the facts as found and the interpretation of the law' (p. 2).

This definition is wide enough to cover the decisions of the Board of Trade whether chattels are compulsorily insurable under the Business Scheme set up by Part II of the War Damage Act, 1943, but in our terminology such decisions are not judicial, but administrative ones, which 'involve, in a greater or less degree, at some stage in the procedure which eventuates in executive action, certain of the attributes of a judicial decision' (*Report on Ministers' Powers*, p. 81). As the Committee itself hinted, and Dr. Jennings has shown (Appendix I to *The Law and the Constitution*), the distinction between judicial and administrative functions is formal and not material, and a function is classed as judicial or administrative by the instituting body after taking into account various factors, the most important being convenience of procedure.

It is interesting to speculate on the reasons which have led the Federal Government to show a decided preference for the separate administrative agency, and for the judicial, rather than the executive, type of procedure. Perhaps, the answer is lip-service to the doctrine of the separation of powers and a healthy mistrust of the due process clause of the Fifth Amendment. But whatever is the reason, the result is that the lawyer can get to know how administrative agencies work in America and their procedure is open to close scrutiny—witness the Attorney-General's Report mentioned above. In England they tend to be tacked on to existing Departments of State with the double result that investigation is not encouraged lest the *arcana imperii* of the Department be revealed to the profane, and that inveterate critics of administrative law are enabled to maintain the cry of 'hole and corner methods' with some slight justification.

The most interesting chapter, however, in the book under review, is the one in which the various types of sanctions employed are analyzed and discussed. A similar study for this country would be invaluable, especially with relation to the present emergency powers. The Defence (General) Regulations, 1939, in their original form seem to have been based on common law views about sanctions; though self-help was sometimes permitted (e.g., D.R. 89, which permits the use of force to enter premises in certain circumstances), they relied in the main on fine or punishment *after* the event. Apart from forcible entry, the threat of prosecution was the only weapon against persons who refused to give vacant possession of land requisitioned under D.R. 51 until 1941, when D.R. 51 (1A) made it possible for police aid to be invoked. Subsequent Defence Regulations, however, show a more practical outlook, e.g., D.R. 18B and D.R. 55 (1F) (which authorizes the seizure and sale of 'black market' goods). Even more surprising is that under the National Service (Armed Forces) Act, 1939, an enlistment notice could not be served on a person unless he had undergone a medical examination, and the maximum penalty for failing to submit to a medical examination (apart from some vague threats in sect. 3 (5)) was a fine of £5. Adequate steps to ensure submission to medical examination were not taken

till the National Service Act of 1941, which empowered the Court to remand persons into the custody of the police for medical examination while the monetary penalties were increased and imprisonment made possible. An interesting sanction was introduced by the Prices of Goods Act, 1939, s. 7 (2), now replaced by sect. 16 (3) of the Goods and Services (Price Control) Act, 1941, under which power was given to order the closing of a business which offended three times or more against the Act, but on the one occasion on which this penalty was inflicted, the Appeal Court substituted a fine.

The sphere of emergency sanctions is, however, much wider. The whole system of food distribution depends on licensing and the most effective sanction is the withdrawal of the licence. More indirect forms of pressure are possible; in the *Carltona Case* (Times Newspaper, 7.10.1943), the statement of claim implies that the decision that the plaintiffs' factory should be closed as part of a concentration scheme was made operative through the Ministry of Food withdrawing essential supplies, the Ministry of Labour withdrawing the workpeople, and the Board of Trade authorizing the Ministry of Works to requisition the premises. One wonders whether when new schemes are under discussion there is any pool of knowledge relating to sanctions which have already been tried and the measure of success which has attended their use. Perhaps Parliamentary counsel might help where the sanctions were of a judicial character, but judicial sanctions often need to be supplemented by administrative sanctions, and it is in this connection that the investigation suggested above would prove helpful.

D. W. L.

Social Control Through Law. By ROSCOE POUND, Former Dean of the Harvard Law School. New Haven: Yale University Press; London: Humphrey Milford, Oxford University Press. 1942. 138 pp. (12s. net.)

This little book contains four lectures delivered by Dean Pound (if one may still give him that title) as Visiting Professor at Indiana University. It is a neat and readable survey of such topics as the rise of law as the paramount means of social control, the nature of law, limits of effective legal action, interests protected by law, and the problem of values.

Since the book contains little that Dean Pound has not said before it is, perhaps, needless to attempt a critical review. If any criticism is to be made in the space of a few sentences, it is that the learned author perhaps exaggerates the practical effect of legal theorising. At p. 3 he says that 'in the eighteenth century, and with us in the fore part of the nineteenth century, the ideal [of law] was provided both for legislature and for judge by the theory of natural law, a theory of a body of ideal precepts of universal validity for all peoples, all times, and all places, derived from ideas of what an ideal man would do and would not do, would claim and would concede as the claims of others, and arrived at by pure reason.' If this means that eighteenth-century philosophers advanced the theory of natural law as an ideal, it is unexceptionable; if it means that legislature and judges in the eighteenth century accepted and strove to attain to this ideal, it is, to say the least, a great exaggeration. On the next page is the similar over-statement that in the seventeenth and eighteenth centuries 'every law book had a philosophical introduction.' At pp. 26—28 the author repeats the idea that he developed at greater length in his *Contemporary Juristic Theory*, namely, that 'theories of what is have marked effect upon ideas of what ought to be . . . When the law-maker is taught that law is the command of the sovereign, whose mouthpiece he is, he tends to think that the words "be it enacted" justify everything that he sets down after them . . . Such ideas [*i.e.*, that law is a command] have come into vogue with the rise of absolute government

throughout the world and give the autocrat the aid and comfort of scientific theory.' The moral intended seems to be that we must not define law in the fashion of Austin or of any other legal positivist, in case this encourages dictators. Not only is this an objectionable type of argument to use in a scientific matter, but also it exaggerates the effect of academic theories upon actual life. The heyday of legal positivism (at any rate in England and America) was in the second half of the nineteenth century, which was not markedly an age of autocracy. Later in the book Dean Pound uses a similar argument in such a way as to be inconsistent with his own teaching. At p. 83 he admits the distinction between legal and moral rights, yet at p. 96 he stigmatises Holmes's attempt to define legal rights without reference to morality as 'a symptom of the rise of political absolutism all over the world.' Holmes wrote his essay, 'The Path of the Law' in 1897, and it is surely fantastic to see any connection between this and the autocrats to whom Dean Pound presumably refers.

These are, perhaps, small points, and for those who desire acquaintance with the work of the foremost American writer on jurisprudence the book can be heartily commended.

G. L. W.

Principles of Private International Law. By ARTHUR NUSSBAUM. New York: Humphrey Milford, Oxford University Press. 1943. xvi and 288 pp. (20s.)

This volume incorporates a series of articles which the author has published in the *Columbia Law Review*, and the *Yale Law Journal*, and which have been suitably abbreviated and adapted, together with a number of further studies in the field of private international law. The title of the book is therefore somewhat misleading. The author is only concerned with certain aspects of private international law, although he has admittedly selected the most important topics, and he does not purport to set out the principles of any particular municipal system of private international law. His method is that of the comparative lawyer, and since he rejects the universalistic trend in private international law the book may be described as a comparative lawyer's contribution to American private international law. At the same time, it is the first comprehensive work published in the United States which makes full use of the numerous and valuable articles published by the adherents of the realist school and by the followers of Lorenzen. From another point of view Professor Nussbaum's book may be regarded as a companion of Maury's well-known Hague lectures. While the latter concentrated primarily on the correlation of Continental trends in private international law, Professor Nussbaum attempts to make the American practice the pivot. However, it cannot be denied that a combination of these conflicting aims is not easy to achieve. The topics selected by the author include the history of private international law and its general structure, classification, *renvoi*, the preliminary question, public policy, domicile and nationality, formalities, the law governing contracts (with all its ramifications) and, finally, questions of procedure. It is impossible to discuss the many points raised by the author, which range over the entire field of private international law. The part dealing with the history and general structure of private international law follows the usual method which stresses more the movement of ideas than the development of legal rules. The examination of the modern tendency among parliamentary draftsmen to attach special conflict rules to statutes dealing with questions of private law is of particular interest. In matters of classification (and of the preliminary question) the author sides with the orthodox school, but having cast his vote in favour of the *lex fori*, he then states that the rule of foreign law must be 'integrated.' The chapter on *renvoi* is strongly influenced by Dean Falconbridge's writings. The discussion of the law governing contracts constitutes

perhaps the most successful portion of the book, but it may be doubted whether the statement that an express choice of law, if powerless to supersede the illegality rules of the *lex loci contractus*, correctly represents the English rule. Finally, in a chapter on international civil procedure, the author discusses questions of jurisdiction, recognition of foreign judgments and proof of foreign law. The section on proof of foreign law in particular repays a careful study. The author's misapprehension regarding the place of reciprocity has been noted elsewhere ((1944) 60 L. Q. R. 93). On p. 153, the wording of note 28 creates the misleading impression that *Ogden v. Ogden* is still good law. Professor Nussbaum has written a scholarly book, the principal merits of which are, first, that it acquaints the reader with recent trends in American decisions, second, that it makes full use of the many valuable articles published in the United States and, third, that it draws attention to the vast store of Continental literature much of which would otherwise have remained hidden even from the student of comparative private international law.

K. L.

A Text-Book of the Law of Tort. By Professor P. H. WINFIELD, K.C.
Second Edition. London: Sweet & Maxwell, Ltd. xxxix and 727
and (index) 17 pp. (35s. net.)

One of the neatest compliments which greeted the first edition of this book was paid by a practising lawyer, who, in the after-glow of a peacetime Trinity Feast, remarked: 'While the legal profession may regard *Salmond* as the Old Testament of the Law of Tort, it has certainly accepted *Winfield* as the Gospel.' There is more in this remark than at first meets the eye.

Though the learned editor of *Salmond* may personally hold different views, his author was quite clear that there was no general principle of liability in tort, but only a number of specific rules establishing liability in certain sets of circumstances. For these individual rules, which Sir John Salmond expounded with such skill, there is sometimes no better reason than that they existed in the reign of Henry IV, and, unlike Mr. Justice Holmes, Sir John did not seem to think that there was anything barbarous in this state of affairs. For him these rules were the commandments of a jealous god which could be analyzed but scarcely questioned.

The whole outlook of Professor Winfield's book is quite different, because he adheres to the opposing view on the question of liability in tort, though he presents it in a somewhat modified form in this edition. It is not that he would sweep away the old law of which he is an acknowledged master; rather he comes not to destroy but to fulfil. He painstakingly attempts to piece together the isolated rules and to produce some coherent theory of liability which can win reasoned assent. But unlike a number of enthusiastic rationalizers, he is honest with himself and with the reader. When he comes to the no-man's-land, as when he deals with invasion of privacy, there is no exaggeration, no raising of false hopes. The reader is told what the law is, and yet is given something more; he is given a vision of how it may develop.

The whole book is written with a clarity which is deceptive. It all seems so straightforward, until one tries one's hands at a little re-phrasing. Then it becomes clear that there has been that careful polishing and reshaping of which a recent reviewer has spoken, which alone can produce the finished article. Professor Winfield has the gift of being able to produce the telling phrase which drives home the point. Out of many examples, I select at random the remark in the footnote, on p. 120, where he is dealing with the theory of Corporations: 'All that English Law admits is that a corporation is an artificial person, and "artificial" is not the same as "fictitious."' A wooden leg may be artificial; it is not a fiction.' Jurisprudence might be more intelligible to the majority of students if it was always expounded with such incisiveness.

Perhaps I may end by quoting a famous lawyer:

'This is a book of principles if it is anything. Details are used, not in the manner of a digest, but so far as they seem called for to develop and illustrate the principles . . . I will hope that some students may be thankful for brevity where the conclusions are brief, and that, where a favourite topic has invited expatiation or digression, some practitioner may some day be helped to his case by it.'

The quotation, of course, comes from Pollock's introduction to the first edition of his *The Law of Torts*.

D. W. L.

Bractonian Problems. By the late HERMANN KANTOROWICZ, LL.D. (Heidelberg), M.A. (Cambridge). Being the ninth lecture on the David Murray Foundation in the University of Glasgow, prepared but not delivered. Glasgow: Jackson & Co. 1941. 133 pp. (4s. net.)

I welcome the opportunity of performing two duties. First, that of paying tribute to the memory of a great scholar who spent his last years among us, having previously, quite apart from Hitler's persecution of the Jews, made many enemies in Germany by his frank and enthusiastic admiration of the British and their institutions. And, secondly, that of thanking Mrs. Stenton for preparing for the press this lecture, the delivery of which was prevented by the author's untimely death in 1940.

The lecture is based on work prepared by Kantorowicz for a seminar in Cambridge, which all who attended recall with gratitude.

The number of persons qualified to guess what value posterity is likely to place upon this contribution to Bractonian research is small, and I am not among them. One thing is certain, that they will have to take into careful account Kantorowicz' theories and conclusions. Some preliminary consideration has already been given to them by the late Sir William Holdsworth in the *English Historical Review* (Vol. 57, p. 502), by Professor Woodbine in the *Yale Law Review* (Vol. 52, p. 428), by Professor McIlwain in the *Harvard Law Review* (Vol. 57, p. 220), and by Professor Schulz in the *Law Quarterly Review* (Vol. 59, p. 172).

As all these articles and reviews are readily accessible, no useful purpose could be served by my taking the space to give a summary of the lecture here. To any one interested I recommend in the first instance the most recent of the articles; that by Professor McIlwain (published in December, 1943), which gives a balanced survey of the issues involved.

Those of us, a dwindling body, who remember Maitland, will agree in reflecting how generously he would have welcomed this book, whether converted to its conclusions, or not. And it is indeed fitting that the last work of a man who loved and admired this country so much should begin with these words of homage to that one of its scholars who has no rival in his own field. Last year's David Murray lecturer (Professor de Zulueta) spoke on Don Agustin, and compared this supreme Spanish scholar to that supreme German scholar, Theodor Mommsen. Both, indeed, attained a fourfold distinction which they can hardly be said to share with any of their compatriots; both were great historians, great textual critics, great jurists, and nevertheless, great literary artists. In this country their only peer, but their peer in every respect, is Frederic William Maitland.

H. A. H.

The Law of Nations. By J. L. BRIERLY. Third Edition. 1942. London: Humphrey Milford, Oxford University Press. viii and 272 pp. (6s. net.)

The third edition of this well-known introduction to the international law of peace follows, with minor alterations, the lines of its predecessors. Lucidity of exposition and ripe scholarship have long established its fame as the best elementary text-book of international law. In the present edition the author has embodied briefly the developments which have taken place since 1936. The task of bringing a book of this kind up to date, without changing its original character, is difficult, but it has been achieved successfully. The question whether at the present time the effects of recognition *de jure* and *de facto* differ in English law, is left open by the author (p. 109). Perhaps a reference to *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2) [1939] Ch. 182, 195, and to *Fenton Textile Ass., Ltd. v. Krassin* (1922) 38 T. L. R. 259, would have been useful in this connection. The *obiter dicta* in *The Cristina* [1938] A. C. 586, with regard to the question whether the rule in *The Porto Alexandre* [1920] P. 30, is good law are discussed in an appendix only. On p. 97, Egypt is described as a fully sovereign State, while some doubts are expressed on p. 93 whether it must still be regarded as a Protectorate. The later passage seems to have been taken over from the previous edition. The thorny problem of the status of Belgium between the two World Wars is discussed at p. 96, but for the developments after 1936 the reader is referred to Oppenheim's *International Law*. Two misprints may be noted. On p. 245, 1938 should be read instead of 1935. Users of the bibliography (p. 266) should note that the first three volumes of Hackworth's *Digest of International Law* were published between 1940 and 1942, and not in 1906.

K. L.

An Introduction to the Principles of the Land Law. By A. D. HARGREAVES, M.A., LL.B., Solicitor, Reader in Law at Birmingham University. Second Edition. London: Sweet & Maxwell, Ltd., 3, Chancery Lane. 1943. 204 pp. (16s. 6d.)

No student's book on law could be more difficult to write than an Introduction to the Land Law. Of two major approaches to the subject one is historical. This is the approach adopted and pursued relentlessly by Mr. Hargreaves: his chapter on New Interests in Land is largely concerned with the Common Law rules of estates in expectancy which have been rendered obsolescent by the 1925 legislation.

The approaches to the bastion of the modern law are guarded by feudalism and the law of tenures flanked by the machinery of the Common Law with the history of Uses and the Court of Chancery in support. Some illuminating comments from economic history make the story more vivid. In a book of such a size and character we should not have included a chapter on *Shelley's Case* from an unusual point of view and would have omitted registration of title if it was to be dealt with in four pages, and, probably, in any case. Nor is it apparent to us why an easement is more 'commercial' land law than was scutage, or what purpose is served by dividing the book into General Principles and Commercial Land Law.

But for historically-minded students—and there should be many—this is a vivid, stimulating and admirable introduction to the subject with a particularly good arrangement that enables the student to see the law whole and not in bits.

Interpretation of Documents. By ROLAND BURROWS, K.C. London: Butterworth & Co. (Publishers), Ltd. 1943. lvi. and 102 pp. (10s. 6d.)

Dr. Burrows intends this little book to be a compendium of the leading rules as to interpretation of documents for the use of both students and practitioners; the latter, as he points out, may be suddenly confronted with questions of interpretation at moments when no library is available to them. The learned author's wide experience both as a practitioner and as a teacher of this subject, as well as of other branches of the law, makes him peculiarly well qualified for achieving his aim. The wealth of references to decided cases must have been primarily for the practitioner; one-third of the book is occupied by the index to some 1,300 cases that are cited. As to the student, it is important to bear in mind that Dr. Burrows expressly disclaims any attempt to deal with the details of the leading rules which he sets out. For law schools in which interpretation of documents is a topic set for examination, the book gives an excellent conspectus and might well be adopted as the basis of fuller oral instruction. The three pages at the end devoted to 'General Principles of Drafting' are especially useful to all of us—practitioners, students or teachers. The last sentence sums up the whole matter: 'It is essential, not only that a document shall be understood, but also that it shall not be misunderstood.'

For the next edition we suggest amplification on one or two points. On p. 5, even allowing for the context in which it occurs, it seems rather dangerous to say that 'An Act of Parliament is construed in the same way as any other document.' On pp. 20—21, 'Ambiguity' is discussed and, for the student at any rate, a definition of patent ambiguity (it is incidentally referred to on p. 18) might be given.

Modern Equity. By H. G. HANBURY, D.C.L., M.A., Fellow of Lincoln College, Oxford; of the Inner Temple, Barrister-at-Law. Third Edition. London: Stevens & Sons, Ltd. 1943. xxiv and 620 pp. (37s. 6d.)

This edition takes account of all the important changes wrought by statute and case-law; war-time legislation and its judicial interpretation are relegated to an Appendix, pp. 552—558, and the permanent changes effected by the Inheritance (Family Provision) Act, 1938, and the Limitation Act, 1939, are incorporated in the text. The commentary on 'Once a mortgage always a mortgage' is rewritten in the light of Lord Greene's judgment in *Knightsbridge Estates Trust v. Byrne*. The book deals with many topics that are not tackled in any other work on Equity and has undoubted merit. For a comprehensive and penetrating review the reader is referred to 60 L. Q. R., 1944, pp. 87—93.

T. E. L.

Jacobs on Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally. By BERTRAM JACOBS, LL.B. Fourth Edition. London: Sweet & Maxwell, Ltd. 1943. xv and 320 pp. (21s.)

There is no better book to meet the needs of a beginner in the law of negotiable instruments than Jacobs; it gives a clear account of the fundamental principles, well illustrated with examples and an accurate analysis of the cases and statutes. This is an up-to-date edition; attention is called to the Emergency Legislation at pp. 275—277. Two new chapters have been added. The 'Equities' and

Bankers' Drafts—Dividend Warrants, and the Bills of Exchange Amendment Act, 1932, is duly noted in the latter. Among the twenty-five recent cases incorporated in the text and critically discussed we note the *Slingsby Cases*, *Lloyds Bank v. Savory*, *Hibernian Bank v. Gysin and Hanson* (pay A only, not negotiable), *Gibbons v. Westminster Bank* (damages for dishonour), *North and South Insurance Corporation v. National Provincial Bank* (pay cash). Many sections have been rewritten or re-arranged. In referring to articles in the *Law Quarterly Review*, it would be an advantage to give the page reference, e.g., p. 1, n. (b); p. 195, n. (c).

T. E. L.

Wheaton's International Law. Vol. 2—War. By A. BERRIEDALE KEITH. Seventh English Edition. London: Stevens & Sons, Ltd. 1944. 672 pp. (50s.)

The sixth edition of this volume was published in 1929. It is a testimony to the popularity of Wheaton's text-book and of Professor Keith's own contribution to it that there should have been a need for another edition within a comparatively short space of time. Professor Keith has decided—wisely, it is believed—that on many matters which have become topical during the present war the position is fluid, and that the editorial work should be restricted to a minimum. But with regard to decisive events the volume has been, on the whole, brought up to date and accompanied by comment. The latter is occasionally perhaps too pungent for a treatise of this character.

Where to Look for Your Law. By R. HILARY STEVENS. Eighth Edition. London: Stevens & Sons, Ltd. 1944. 254 pp. (2s. 6d., interleaved 5s.)

This is an invaluable work to practising lawyers and students; a law librarian cannot be without the interleaved copy. It is an excellent guide to current law books arranged under subjects and authors. A judicious selection is made of works on Dominion, Colonial and Foreign Law. Several improvements have been made in the eighth edition, and it is thoroughly up to date. The principal change is in the section on Law Reports and their abbreviations which has been entirely recast in a more convenient form for easy reference and extended by some sixteen pages. Dr. Glanville Williams' references to the 'English Reports' in 7 C. L. J. 262 are incorporated. Mr. Stevens has rendered a real service to all who are interested in the law and its literature.

T. E. L.

Medieval Feudalism. By CARL STEPHENSON, Professor of History in Cornell University. Cornell University Press. 1942. 116 pp. (\$1.25.)

Professor Stephenson, the author of the article on 'The Origin and Significance of Feudalism' in the *American Historical Review*, XLVI, 788—812, has written this charming little book for the purpose of supplementing the brief statements on the subject of feudalism in the ordinary text-books. He has restricted the discussion to the few institutions that constituted feudalism proper or were peculiarly associated with it. Four of the six chapters, dealing with feudal custom when

it enjoyed its greatest vigour, are designed to introduce not only the fundamental principles but also, by citing specific cases, the actual working of the system.

It is illustrated by delightful drawings of some of the figures in the Bayeux tapestry by Miss Julia Edmondson.

A short bibliography suggests books for further elementary reading. Attention is particularly called to two modern works in French on la société féodale, one in a single small volume by Calmette, Paris, 1938, the other in two volumes by Block, Paris, 1939—40.

H. A. H.

Plans for World Peace through Six Centuries. By SYLVESTER JOHN HEMLEBEN. The University of Chicago Press; The Cambridge University Press. 1943. 227 pp.

This is, in the main, an informative presentation of schemes of international organisation up to 1919. In four chapters the author has packed a mass of erudition and critical comment. The bibliographies are detailed and afford a good starting point for further investigation. The student will find specially useful Chapter IV on schemes of international organisation during the World War of 1914—1918. The concluding chapter, entitled 'Reflections,' is perhaps the least satisfactory. The author's analysis of natural law as 'based on the ordinance of God and made known to us through natural reason' (p. 194) is not helpful and fails to do justice to the conception of natural law. His description of the nineteenth century as the century of arbitration on the ground that in 'each successive decade the number of arbitration cases doubled' (p. 190), will probably fail to commend itself to many. The book as a whole is a scholarly production and a valuable instrument of study.

H. L.

Annual Survey of English Law, 1940. Published for the London School of Economic and Political Science (University of London) Department of Law by Sweet & Maxwell, Ltd., London. 1943. xxvii and 295 pp. (15s. net.)

The present volume, like its predecessors, is the joint work of the members of the School, and maintains the same high standard. To those who know of the removal of the School from London and of the heavy demands made by national service upon its teachers, it is no cause for surprise that the publication of this volume has been delayed. The cases and statutes may be two years old, but the critical notes and comments are fresh and illuminating. It is difficult to deal comprehensively with Emergency Legislation in a volume of this kind, but a great effort has been made in this respect. The contributors are to be congratulated upon the production of a most useful survey under most difficult conditions.

T. E. L.

World Court Reports. Vol. IV. Edited by MANLEY O. HUDSON. Publication of the Carnegie Endowment for International Peace, Division of International Law. Washington: Columbia University Press. 1943. xvi and 513 pp. \$2.50.

The fourth volume of the *World Court Reports* contains the decisions of the Permanent Court of International Justice handed down between 1936 and 1942. The value of the book is enhanced by the inclusion of materials taken from series C and E of the publications of the Court and by extensive bibliographical references. More-

over, the revised statute of the Court and the rules of the Court are reproduced in full. The thanks of all students of international law are due to the editor for having made available in a very convenient form one of the most important sources of the law of nations.

K. L.

Harris and Wilshire's Criminal Law. Seventeenth Edition. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1943. xlvii and 700 pp. (21s.)

In its new edition this extremely useful book, which has been well described as the 'Student's Archbold,' is substantially unaltered. Some re-arrangement of the subject-matter has been successfully effected and all the more important cases and statutory developments since 1936 have been included. The problems which were presented to the writer of text-books such as this by the growing spate of legislation before 1940 have been much increased by the volume of statutes and regulations which the present war has engendered. The author is to be sincerely congratulated on the manner in which he has dealt with this difficulty.

J. W. C. T.

Criminal Procedure. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1943. xxii and 298 pp. (12s. 6d.)

This book is made up of Books IV and V of Harris & Wilshire's *Criminal Law*, reviewed above, arranged to suit the convenience of those who may have occasion to confine their attention to the procedural side of criminal law.

J. W. C. T.

Intent in Criminal Conspiracy. By ALBERT J. HARNO, LL.D., Dean of the College of Law, University of Illinois. *Pennsylvania Law Review*, Vol. 89, No. 5.

This article forms a valuable addition to the literature on the interesting and abstruse subject of Conspiracy. A crime which is so elastic and so capable of use as an instrument of oppression calls for the most careful analysis by jurisprudential authority. After a brief survey of the historical origins of the crime, the author proceeds to investigate the mental element under the heads, 'Intent to agree in Conspiracy,' and 'The Common Intent in Conspiracy.' The conclusion to which Professor Harno comes is that the gist of the crime lies not in the agreement, but in the intent, and that, when rightly circumscribed, the law of conspiracy is confined to the repression of combinations aimed at the commission of a specific anti-social act which also involves a violation of positive law.

J. W. C. T.

Harris's Hints on Advocacy. Eighteenth Edition. By G. W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law and Dean of the Faculties of Laws in the University of London, and at University College, London. London: Stevens & Sons, Ltd. 1943. iv and 334 pp. (12s. 6d. net.)

The fact that this book has run to eighteen editions since 1879 is overwhelming proof of its merits and well-deserved popularity. It is full of practical advice, useful hints and humorous comment; it makes entertaining and instructive reading; it covers the whole field of advocacy and is a sound guide to the beginner and a refresher to the trained advocate. In this edition, Professor Keeton has preserved as much as possible of the original text, re-arranged some of the later chapters, and the changes in the text are as few as the modern practice justifies. He has enhanced the value of the book to the student by his two chapters on the nature of advocacy and preliminary matters.

T. E. L.

The Conveyancers' Year Book, 1943. By SIR LANCELOT H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. Vol. 4. London: The Solicitors' Law Stationery Society, Ltd. 1943. xl and 250 pp. (25s. net.)

This is a digest of and a commentary on the cases, statutes, orders and regulations for the year 1942. The notes, comments and summaries are comprehensive, giving a clear explanation of complicated points of law and practice, and the references to, and extracts from, articles and notes in current legal periodicals have increased. At pp. 180—181 we note the discussion of Mr. S. J. Bailey's article on Trusts and Titles in (1942) 8 C. L. J. 36—50, and the statutory remedy suggested to meet the difficulties raised. The skill and accuracy of the learned editor is manifest throughout, the care bestowed in keeping the work up to date is apparent at pp. v—vi, and easy reference is provided by the table of cumulative contents of Volumes I—IV at pp. vii—xxiv. The claim of the publishers that the work is indispensable to all conveyancers is established beyond shadow of doubt.

T. E. L.

Leading Cases in a Nutshell. By E. S. FAY, M.A., of the Inner Temple, and the Western Circuit, Barrister-at-Law. Third Edition. London: Sweet & Maxwell, Ltd. 1943. vi and 137 pp. (6s. net.)

This is a handy collection of about 260 leading cases—Constitutional Law (31), Criminal Law (35), Tort (46), Contract (40), Evidence (27), Real Property (25), Equity (52). A judicious selection has been made and some ten new cases have been added. It should be very useful for revision.

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